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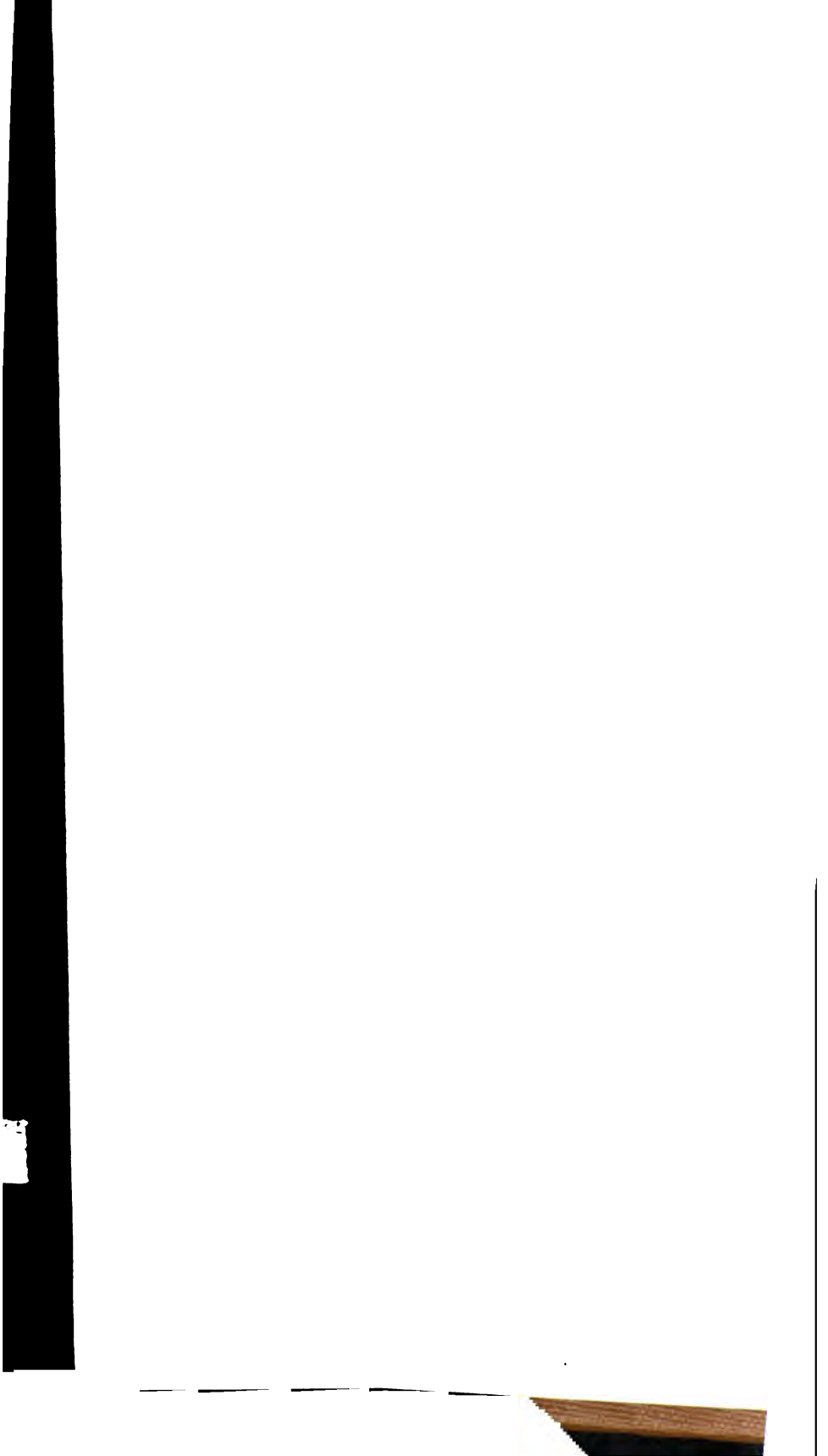
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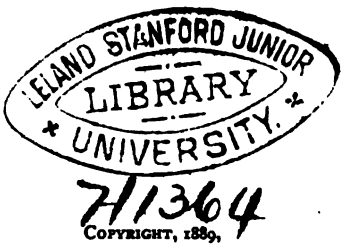
A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA AND ENGLAND.

JAS. M. KERR, - - - - - EDITOR.
WM. M. McKINNEY, - - ASSOCIATE EDITOR.

VOL. XXXV.

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STATE

v.

WABASH R. CO.

(*Indiana Supreme Court, September* 18, 1888.)

Corporations—Insolvency—Criminal Prosecution—Acts of Receiver.—A corporation which is in the hands of a receiver, who has full possession of its property and entire charge of its affairs, cannot be prosecuted for crimes and misdemeanors committed by the agents and servants of the receiver: e.g., the obstruction of a public highway.

APPEAL from Circuit Court, Huntington County.

Prosecution against the Wabash R. Co. for obstructing an alleged public highway. Plaintiff appeals from a judgment for the defendant.

E. C. Vaughn, B. M. Cobb, and *C. W. Watkins* for appellant.

C. B. & W. V. Stuart for appellee.

ELLIOTT, J.—The record shows that the Wabash R. Co. is in the hands of a receiver appointed by the circuit court of the United States, and that the servants of the receiver constructed a platform across what had once been a public street, but which it is claimed had been vacated. It is only necessary for us to decide that where a corporation is in the hands of a receiver, who has full possession of its property, and entire charge of its affairs, the corporation cannot be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver. As the corporation can do no act while the receiver is in full control, it can commit no offence. This seems so clear as not to require discussion. Ohio & M. R. Co. *v.* Davis, 23 Ind. 553; Bell *v.* Indianapolis, C. & L. R. Co., 53 Ind. 57. We need not inquire or decide whether a corporation is liable to a criminal prosecution for the acts of its agents or servants in obstructing a highway, for here the wrong charged against the corporation was not committed by the corporation, but by an officer of the federal court, placed in charge of the corporate affairs. Judgment affirmed.

Corporation In Hands of Receiver—Action for Injuries.—A railroad or other corporation in the hands of a receiver is not liable for the acts of

the receiver or of his employees in those cases where the receiver's possession is complete (Ohio & M. R. Co. *v.* Davis, 23 Ind. 553; Leathers *v.* Ship Builders' Bank, 40 Me. 386,); but it would seem that the liability continues where the possession of the receiver and of the corporation is a joint one. Washington, A. & G. R. Co. *v.* Brown, 84 U. S. (17 Wall.) 445; bk. 21 L. ed. 675.

It is said in Davis *v.* Duncan, 19 Fed. Rep. 477, that a railroad company is not liable for injuries committed while the road is in the hands of a receiver, because it was out of possession of the property and had no control over it. But it has been held in Illinois, under the Fencing Act, that an action for failure to fence may be maintained either against the owner of such road, or the person actually operating it, and that for that reason an action will lie against the company owning an unfenced road, although in the hands of a Federal receiver. Ohio & M. R. Co. *v.* Russell, 115 Ill. 52.

LEHIGH COAL AND NAVIGATION CO.

v.

CENTRAL R. CO. OF NEW JERSEY.

(New Jersey Court of Chancery, 1887.)

Personal Injuries—Action—Substitution of Receiver—Limitations.—On an application by the plaintiff in an action against a railroad company, which is in the hands of a receiver, to recover for personal injuries, the court of chancery may, when consenting to the substitution of the receiver as party defendant, restrain the receiver by order from setting up in defence the statute of limitations, the action having been commenced against the railroad company within the statutory limit.

Same—Amendment—New Cause of Action.—Although the receiver of an insolvent corporation be substituted as party defendant, by consent of the court by which he has been appointed, such substitution does not constitute a new action, but is merely a proceeding in the action already brought.

PETITION by Benajah Layton for consent of the court to amend a declaration in an action at law to recover damages for personal injuries by substituting the name of the receiver in place of the defendant corporation. The opinion states the case.

Mr. Frederick Parker for petitioner.

Mr. B. Williamson for defendant.

BIRD, V.C.—The petition now presented snows that the petitioner, Benajah Layton, was injured by the engine of the defendant, and that he brought an action at law against the defendant corporation while it was in the hands of a receiver, appointed by an order of this court; that he filed

Facts.

his declaration which was demurred to; that the supreme court allowed him to amend his summons by substituting the receiver as defendant, and to amend his declaration to the same effect, with the proviso in the order allowing such amendments, that, "The chancellor of the State shall, on application of the said plaintiff to him, grant permission and consent to such amendment, and the continuance of said suit against said receiver as aforesaid."

If, before the action was begun, application had been made for leave to proceed against the receiver, it would, doubtless, have been granted.

But at this time the petitioner asks for an order restraining the said receiver from setting up the Statute of Limitations as a defence to said action at law. Although the action pending be in another tribunal, I think this court has jurisdiction of the parties, so far as to take action on the particular question. The receiver holds his position as such by virtue of an order of this court; and the petitioner comes into this court to obtain permission to proceed, at law, against the receiver; both, therefore, being in this court.

As to the Statute of Limitations: Shall this court attempt to control that question preventing the receiver from interposing it as a bar? First, ought that court, which has the right and power, to interpose in behalf of the alleged creditor? I think so in such a case as this, if ever; for in one sense it is the defendant company which is liable, although that liability can only be established against the receiver. The receiver does not pay nor answer for anything out of his own funds or estate; but only out of the assets of the defendant company so far, only, as they will extend.

Restraining receiver from setting up statute of limitations.

But again; as appears by the record before me, the action at law in the supreme court was instituted in time to avoid the statute; and that suit is still pending, not, it is true, against the same defendant technically, but practically; for in its stead has been placed its agent, the receiver; its agent, to the extent that he manages all its affairs; and this, therefore, makes another observation manifest; that is, that it is the same action, and, consequently, the same record, although the pleadings therein have been amended.

Coming to this conclusion, then, ought this court to interpose? I say *this* court, for I can only speak for this court.

While it seems to me that a court of law would say this is no case for the interposition of the plea of the statute, yet upon some ground better known to those who pay greater attention to, and have constant experience in, the courts of law, such courts may allow such plea. Hence, I think this court ought to act. Upon being

called upon by those interested, this court could direct the receiver to set up the statute. This, I think, cannot be doubted. If the court has the just right in the one case, there can be no doubt but it has the same right in the other.

My mind follows and is influenced by the conviction that this court has the same control over the actions of the receiver suing or being sued in a court of law as though all the proceedings were in this court, because he is the creature or officer of this court. This control can be, as it always has been, exercised without a shadow of conflict. If, therefore, the proceedings were in this court for this recovery, and the proceedings had been amended as they have been in the supreme court, this court would say that the statute is no bar, for it had not commenced to run at the time of the institution of the suit. Although the pleadings have been very materially amended by striking out the name of the only defendant and inserting the name of another, yet it is the same suit; a suit which was begun before the statute began to run.

Same—Substitution not a new action.

There is sound reason for this, and I think excellent authority. In Thorpe *v.* Mattingley, 2 Younge & C. Exch. 421, where a bill for tithes had been filed within the period limited by the statute, and amended after that period for the purpose of adding another party, it was held sufficient as against the last named party, inasmuch as the bill and amended bill formed but one record.

In Boyd *v.* Higginson, 5 Irish Eq. Rep. 97, it appears that a bill was filed in 1833, to establish a will and to have legacies declared a lien on real estate. The defendant was not brought in by subpœna or otherwise. December 24, 1841, the legatee filed another bill, making mention of the filing of the former bill, "as by said original bill or record will appear," and relying on that bill as a bar to the statute, and praying that the will might be established and the legacies made a lien on the real estate. This latter bill was not described in any part of it as an amended bill, but was marked as such by the proper officer when filed. The bill filed in 1841 was demurred to; but the court decided that it should be considered as an amended bill, and that the suit was pending from the date of filing the original bill in 1833, and that the filing of that bill, without service of subpœna, was sufficient to save the plaintiff's demand from the operation of the statute. See also Smith *v.* Walsh, 1 Irish Eq. R. 167.

Liability of Receiver for Torts and Injuries.—A receiver of a railway is liable in an action for torts and injuries caused by his own negligence, default, or misconduct (Klein *v.* Jewett, 26 N. J. Eq. [11 C. E. Gr.] 474), or

the negligence of the persons employed by him in operating the road. Ohio & M. R. Co. *v.* Davis, 23 Ind. 553; Mearas Adm'r *v.* Holbrook, 20 Ohio St. 137; s. c., 5 Am. Rep., 633; Kinney *v.* Crocker, 18 Wis. 74; Kennedy *v.* Indianapolis C. &. L. R. Co., 2 Flip. C. C. 704. See Lamphear *v.* Buckingham, 33 Conn. 237; Ballou *v.* Farnum, 91 Mass. (9 Allen) 47; Barter *v.* Wheeler, 49 N. H. 9; Little *v.* Dusenberry, 46 N. J. L. (17 Vr.) 614; s. c., 25 Am. & Eng. R. R. Cas. 632; Davis *v.* Duncan, 19 Fed. Rep. 477. It has been said that "it accords with sound principle and reason that a receiver exercising the franchises of a railroad company should be held amenable in his official capacity in the same rules of liability that are applicable to the company while it exercises the same power of operating the road." Mear's Adm'r *v.* Holbrook, 20 Ohio St. 137; s. c., 5 Am. Rep. 633. See Ohio & M. Co. *v.* Davis, 23 Ind. 553; Nichols *v.* Smith, 115 Mass. 332; Paige *v.* Smith, 99 Mass. 395; Potter *v.* Bunnell, 20 Ohio St. 159; *Ex parte* Brown, 15 S. C. 518; Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44; Blumenthal *v.* Brainerd, 38 Vt. 402; Pope's case, 30 Fed. Rep. 169; Winbourin's Case, 30 Fed. Rep. 167.

Michigan and Iowa Doctrine.—In Michigan it has been questioned whether an action for injuries can be maintained against the receiver of a railroad company in whose employment the party was at the time of the injury. See Smith *v.* Flint P. M. R. Co., 46 Mich. 258; s. c., 41 Am. Rep. 161. In Iowa the matter has been regulated by the Code, and an action may be maintained against the receiver of a railroad, appointed either by the courts of the State, or a circuit court of the United States, by an employee of such railroad, who has been injured by reason of the negligence of the co-employee or fellow-servant. Central Trust Co. *v.* Sloan, 65 Iowa, 655; Sloan *v.* Central Iowa R. Co., 62 Iowa, 728.

Tort Committed Before Receiver Appointed.—An action may be maintained against the receiver of a corporation for a tort committed by the corporation or its servants before his appointment. Combs *v.* Smith, 78 Mo. 32, 38.

Character of Judgment—Payable Out of Income.—In an action against a receiver for personal injuries or tort, sustained either before or after his appointment, any judgment recovered by the plaintiff will be against the receiver in his official capacity as such, and is leviable out of the assets of the corporation in his hands. Combs *v.* Smith, 78 Mo. 32, 38; Central Trust Co. *v.* Sloan, 65 Iowa, 655; Sloan *v.* Central Iowa R. Co., 62 Iowa 728; Com. *v.* Runk, 26 Pa. St. 235. And if the income of the road has been invested in betterments, such judgment will be payable out of the proceeds of the same to the extent of the value of the income. Ryan *v.* Hays, 62 Tex. 42.

Injuries Occurring Under Receiver's Management—New York Doctrine.—It was held in the case of Cardot *v.* Barney, 63 N. Y. 281, that an assignee or receiver in bankruptcy of an insolvent railroad corporation who, as such assignee, is running and operating its road, in the absence of evidence that he assumed to act other than as assignee, or that he held himself out as a carrier of passengers other than as an officer of the court, is not liable in an action for injuries causing the death of a passenger where no personal negligence is imputed to him, either in the selection of agents, or in the performance of any duty, and where the negligence charged was that of a subordinate, whom he necessarily employed in compliance with the order of the court. The court distinguishes Rogers *v.* Wheeler, 43 N. Y. 598; s. c., 20 Am. Rep. 432; Ferrin *v.* Myrick, 41 N. Y. 315; Lamphear *v.* Buckingham, 33 Conn. 237; Paige *v.* Smith, 99 Mass. 395; Ballou *v.* Farnum, 91 Mass. (9 Allen) 47; Barter *v.* Wheeler, 49 N. H. 9; Blumanthal *v.* Brainerd, 38 Vt. 402; Sprague *v.* Smith, 29 Vt. 421. In the more recent case of Kain *v.* Smith, 80 N. Y. 458, where a receiver

appointed by a court in Vermont had by the permission of that court leased a line of railroad in New York, and operated it in connection with a line in Vermont, the receiver was held liable for injuries received by an employee upon the leased line, upon the ground that he was liable under his contract of lease, and that the fact that he was a receiver of a foreign court did not affect the case. The court in this case review and distinguish Cardot *v.* Barney, *supra*. It is thought that the case of Cardot *v.* Barney is authority only upon the point that an individual liability cannot be fastened upon the receiver, because it proceeds upon the theory that receivers of railroads are public officers, and as such are not answerable for the negligence or wrongful acts of their subordinates. See 25 Am. L. Reg. 302.

Same—Wages During Recovery.—In the case of Missouri Pacific R. Co. *v.* Texas Pacific R. Co., a switchman claimed from the receivers of defendant company compensation for injuries sustained in the line of his duty. The master reported, exonerating the company from liability for negligence. The court held that it was just and good policy for the company to pay wages during recovery from the injuries so received.

KANSAS PACIFIC R. CO.

v.

SEARLE.

(*Colorado Supreme Court, January* 4, 1888.)

Receiver—Carriage of Goods—Loss—Liability of Company.—If a receiver has been appointed for the management of an insolvent railroad corporation, and the road is operated, and traffic carried by him under authority of the court, goods lost in transit not being carried under an undertaking by the corporation, the negligence, if any, causing the loss, is not the negligence of the corporation, and an action will not lie against it therefor.

APPEAL from District Court, Arapahoe County.

Action against the Kansas Pacific R. Co. to recover damages for the loss of certain goods, the property of the plaintiff, while in transit between Kansas City and Denver. The opinion states the case.

Teller & Orahood for appellant.

Browne & Putnam for appellee.

STALLCUP, C.—The appellee was plaintiff below. His complaint was filed July 1, 1882, and was as follows: "The plaintiff complains and alleges: (1) That at the times hereinafter mentioned the defendant was, and is now, a corporation, and as such was a common carrier of goods, for hire, between Kansas City, in the State of Missouri, and Denver city

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in the State of Colorado. (2) That on, to-wit, the first day of September, A. D. 1879, at Kansas City aforesaid, he caused to be delivered to defendant, in consideration of the sum, to-wit, of fifty dollars, then paid to defendant by the plaintiff, which the defendant agreed to carry safely to Denver, and there deliver, to the order of the plaintiff, certain goods, the property of the plaintiff, of the value of four hundred and eighty dollars, consisting of one parlor set of furniture, two easy chairs, six small chairs, one center-table, one sofa, two black walnut bedsteads, one extension table, two bed-springs, one writing desk, two cane-seated rocking-chairs, one white hair-mattress, one box and contents, and one other box and contents,—said two boxes filled with numerous articles of table linen, bed-clothes, and small articles of household goods too numerous to mention,—which the plaintiff then and there delivered to the defendant, which defendant received upon the agreement and for the purposes before mentioned. (3) That the defendant did not safely carry and deliver said goods pursuant to said agreement, but, on the contrary, defendant so negligently conducted and so misbehaved in regard to the same in its calling as carrier, that said goods were not delivered to plaintiff at Denver aforesaid, although the plaintiff made frequent demands for the same, to-wit, at the county and city of Denver aforesaid, and the said goods were wholly lost to plaintiff, to his damage in the sum of four hundred and eighty dollars. Whereupon, plaintiff demands judgment for $480, and the costs of this action against the defendant."

The railway company filed its answer, in which it specifically denied the allegations of the complaint. Upon the trial, evidence was adduced by the appellee, tending to show that the goods consisting of household furniture, of the value of about $480, were shipped by him from Milwaukee, in the State of Wisconsin, in a chartered car, to Denver; and that such car and goods were carried from Kansas City to Denver over the railway of appellant, and were destroyed or lost while at Denver, in the charge of those who were then operating said railway. Upon the defence, the appellant offered to prove that, at the time of the alleged grievance, the Kansas Pacific R., being the railway of the appellant, was in the hands of S. T. Smith, as receiver, under an order of the United States circuit court, and that the railway was operated by him, as such receiver, at that time; that the said Kansas Pacific R. Co. was not at that time engaged as a common carrier between Kansas City and Denver, or any other place; and that the persons who had the custody of the goods of the plaintiff were the agents and employees of the said receiver, and not of the said railway company. The appellee objected to the introduction of this evidence, and the court sustained the objection. The jury returned a verdict for the plaintiff for the

amount claimed. Motion for a new trial was made by appellant, for the rejection of this evidence, and other reasons. The motion was denied, and judgment entered upon the verdict; from which appellant appealed, and assigns these rulings as error for the reversal of the judgment. In view of the evidence offered, the liability for the loss of the goods was against the receiver operating the railway, in his official capacity. The court erred in excluding the evidence offered by the appellant, and in denying the motion for a new trial; as the evidence offered was such as to show that there was no undertaking in the premises upon the part of the appellant, nor negligence of any kind by it, or its agents; that such undertaking and negligence, if any, in the premises were by the receiver then operating the railway. Railway Co. *v.* Davis, 23 Ind. 553; Meares *v.* Holbrook, 20 Ohio St. 137; Klein *v.* Jewett, 26 N. J. Eq. 474; Kennedy *v.* Railway Co., 3 Fed. Rep. 97. The pleadings were sufficient for such proof. Railway Co. *v.* Davis, *supra*.

Liability against receiver.

The judgment should be reversed, and the case remanded.

We concur: DE FRANCE, C.; RISING, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

Liability of Receiver as Common Carrier.—In the operation and management of railroads by receivers in chancery, they sustain to persons dealing with them the character of common carrier; and are amenable in the common law courts to actions for negligence as carriers. Paige *v.* Smith, 99 Mass. 395; Newell *v.* Smith, 49 Vt. 255, 264; Morse *v.* Brainerd Trustees of Vt. & Cent. R. Co., 41 Vt. 550; Blumenthal *v.* Brainerd, 38 Vt. 402. See Paige *v.* Smith, 99 Mass. 395; Kain *v.* Smith, 80 N. Y. 458; Melendy *v.* Barbaur, 78 Va. 544; s. c., 25 Am. & Eng. R. R. Cas. 622; Kinney *v.* Crocker, 18 Wis. 74. Both upon principle and authority, such receiver stands, in respect to duty and liability, just where the corporation would were it operating the road, and the question whether or not the receiver is liable for negligence must be tested by the same rules that would be applied if the corporation were actually the party defendant before the court. Klein *v.* Jewett, 26 N. J. Eq. (11 C. E. Gr.) 474, 476; Meara *v.* Holbrook, 20 Ohio St. 127; s. c., 5 Am. Rep. 633. See Lehigh Coal & Navigation Co. *v.* Central R. Co. of N. J., *ante* 2, and note 4–6.

It is held in Cowdry *v.* Galveston, H. & H. R. Co., 93 U. S. (3 Otto) 352; bk. 23, L. ed. 950, that the earnings of a railroad in the hands of a receiver are chargeable with the value of the goods lost in transportation and with damages done to property during his management. *Compare*, however, Wabash R. Co. *v.* Brown, 5 Ill. App. 590, where it was held that a bill could not be maintained to charge upon the funds in the receiver's hands, damages for negligence resulting in the death of complainant's intestate. But in Mobile & O. R. Co. *v.* Davis, 62 Mass. (8 Cush.) 271; s. c., 26 Am. & Eng. R. R. Cas. 425, it was held that claims for injuries are chargeable upon the earnings of the road.

CENTRAL TRUST CO.

v.

NEW YORK CITY & NORTHERN R. CO.

(*New York Court of Appeals, October* 2, 1888.)

Taxation—Collection—Exclusive Remedy—Insolvent Corporation.—Under the New York Corporation Tax Act of 1880, which provides that taxes shall be collected for the use of the State as other taxes are recoverable by law from corporations, and that taxes may be sued for in the name of the people of the State and recovered in any court of competent jurisdiction, in an action brought by the attorney-general at the instance of the comptroller, the remedy so provided does not preclude the court from ordering the receiver of an insolvent corporation to pay the corporation tax upon the franchise out of the money in his hands, which are derived from the exercise of the corporate powers as authorized by the franchise, where such corporation is largely and hopelessly insolvent.

Same—Taxes Upon Franchise—Liability of Receiver.—If a receiver of an insolvent railroad company operates the road in the same manner as if the corporation were solvent, the money derived by him therefrom are derived from the use of the franchise conferred upon the corporation, and therefore are subject to the payment of the tax upon the franchise imposed by the New York Corporation Tax Act of 1880.

Same—Bondholders—Priority.—The amount due for a State tax upon the franchise of a corporation, which is in the hands of a receiver, takes priority of claim upon the funds in the receiver's hands over claims of the bondholders of the corporation.

APPEAL from General Term of the Supreme Court, First Department.

Petition by the attorney-general of the State of New York, praying for an order directing Joel B. Erhardt, the receiver appointed in an action by the Central Trust Co. against the New York City & Northern R. Co., to pay the corporation tax upon the franchise of said railroad company out of the moneys in his hands. The supreme court at special term granted the order prayed for, but upon appeal it was reversed by the general term. The attorney-general appeals from the order of reversal.

Charles F. Tabor, Atty.-Gen., for appellant.

Artemus H. Holmes for respondents.

PECKHAM, J.—The railroad company above named was incorporated under the laws of this State, and had its principal

business office in the city of New York. In May, 1882, a receiver thereof was appointed in proceedings taken to sequestrate its property by a judgment creditor whose execution had been returned unsatisfied. Such receiver operated the road from the time of his appointment to February 3, 1885, when another receiver was appointed in the action above entitled, which is brought to foreclose certain mortgages executed by the company upon its property. The first receiver turned over the property and the possession of the road to the receiver appointed in the foreclosure proceedings, and from the time of the appointment of the latter up to a time subsequent to the year ending June 30, 1886, he has operated the road by virtue of such appointment. Taxes became due and payable under the corporation tax act of 1880, as amended by chapter 361 of the laws of 1881, which amounted at the time of the filing of his petition by the attorney-general, in February, 1887, to about the sum of $8000; being for taxes on the gross earnings of the road as thus operated for the years ending June 30, 1883, 1884, 1885, and 1886, respectively. No question is made as to the amount of the tax in each year, or that there is a sum in the hands of the receiver which may be applicable to their payment; but the counsel for the receiver insists that the corporation is alone answerable for the taxes, and that recourse must be had to it for the payment of the same, or to such funds as may remain in the receiver's hands after the claims of the mortgages have been satisfied; which in this case is but another manner of stating that there is no way of collecting these taxes, for, if their payment is to be postponed to the payment of the whole amount of the mortgage debt of the company, all of its property will have been wholly exhausted long before payment in full of its mortgage indebtedness could be made. Various other objections were taken to the granting of the petition of the attorney-general.

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The taxes in question having been levied by virtue of the above-mentioned corporation tax law, were taxes upon the franchise, as distinguished from the property, of the corporation. People *v.* Insurance Co., 92 N. Y. 328. Upon this assumption the counsel for the receiver claims that the taxes are not made a lien upon property by the act creating them, and cannot, therefore, be held to be a prior or paramount charge upon the funds in the receiver's hands, on the ground that they are debts due to the State, or on the ground of public policy. The manner of proceeding to collect these taxes has been designated in the act which imposes them, and is to be found in sections 7 and 9 of such act. By section 7 the tax "shall be collected for the use of the State as other taxes are recoverable by law from such

Proceedings to obtain payment of taxes.

corporation," etc.; and by section 9 the taxes " may be sued for in the name of the people of the State, and recovered in any court of competent jurisdiction in an action to be brought by the attorney-general at the instance of the comptroller." Under section 7, the proceedings to collect the taxes being the same as other taxes are recovered by law (not relating to those imposed on real estate), those proceedings would be regulated by the Revised Statutes, as amended by chapter 456 of the Laws of 1857. It is argued that, as proceedings to enforce the collection of taxes thus imposed are provided for in the very act which imposes them, such proceedings must in all cases be taken, and that all other remedies are absolutely excluded. It is upon this ground that the learned judge who wrote the opinion at the general term proceeded, the result of which was to reverse these proceedings, because not undertaken pursuant to the provision of the statute in question. Generally speaking, the rule as thus laid down is to be followed, and the remedy is confined in the manner stated. But in such a case as this we think the rule is not to be applied. When the property of a corporation is already sequestrated, and a receiver appointed, and where in addition thereto foreclosure proceedings are pending against it to foreclose mortgages to an amount in excess of all its property, and a receiver has also been appointed under such proceedings, and where the corporation is largely and hopelessly insolvent, and all of its property in the hands of the receiver appointed by the court, and where the money to pay the taxes has arisen from the gross earnings, and an amount sufficient to pay them is in the hands of the receiver, we are of opinion that the proceedings to obtain payment of those taxes thus in the receiver's hands are not confined to those provided for by the act cited, but that a direct application for an order on the receiver for their payment may be made to the court by petition, as in this case, having made the corporation and the receiver a party thereto. If there are any disputed questions of fact to be determined, the court may direct an action to be brought, or may determine it in some other and more summary way.

We feel more certain in regard to this question by looking at the proceedings which are provided to be taken under the general laws. They are to be instituted by petition upon which the court may sequestrate such part of the property of the company as shall be necessary for the purpose of satisfying the taxes in arrear with the costs, etc.; and in its discretion the court may proceed further, and enjoin the company and its officers from any further proceedings under the charter, in order to enforce the payment of the taxes. But, in a case where the whole of the property has already been

Same—Payment by receiver—Order of court—Injunction.

sequestrated under other proceedings, the sequestration provided for would not be very efficient. Neither would an injunction which simply enjoined the company and its officers from further proceedings under the charter be in and of itself very efficient as against a receiver who was operating the railroad under the order of the court. In such case, if the injunction were granted, it would only become effective because the court would then order its officer, the receiver, to pay the tax, and go on with the operation of the road. But it would be a farce for the court to first issue the injunction against the receiver, restraining him from operating the road until be paid the tax, and then ordering him to pay it for the purpose of continuing its proper operation. The result would be that the receiver in the end would pay the tax, because he was ordered to do so by the court. The order might just as well be issued in the first instance, without this circuitous method. The privilege granted by the other section of the act of 1881, to sue for the taxes in the name of the people, in an action brought by the attorney-general at the instance of the comptroller, would also result in the court ordering the receiver to pay the tax, for in no other way could the judgment for the recovery of the tax become effectual. In all cases, therefore, the payment by the receiver would be made by order of the court, and in all cases the order might just as well be made in the first instance.

Same—Right of State to moneys applicable to payment.

We do not think that these provisions of the statute should, under such circumstances, be held to restrict the general power of the court to direct its officer to pay those claims which exist in favor of the State for taxes imposed upon the corporation, where the claim of the State for the payment of such taxes is, as we think, a paramount one. An insolvent corporation in the hands of and operated by a receiver was not in the minds of the framers of the statute when providing for the enforcement of payment of taxes from what may be termed a "going corporation." It may be admitted that in a strict and technical sense these taxes, when first imposed, are not a lien upon any specific property of the corporation. But we are of the opinion that the railroad, when in the receiver's hands and operated by him, is operated under and by virtue of the franchise which has been conferred upon the corporation by the State; and that when he receives the gross earnings arising from its operation, and has in his hands money enough to pay these taxes, the State has a paramount right to collect them before the moneys applicable to such payment shall be paid away by the receiver. Having such paramount right, the court may in its discretion listen to the petition of the State through its attorney-general, and direct its officer to make the payment asked for.

It is claimed, however, that when a receiver is appointed by the court, if he operates the railroad under its order, he does so by virtue of the equity powers of the court conferred by the constitution; and hence that the receiver is not bound to pay the taxes, although he receives all the earnings of the company. But what does the receiver operate? Under this order of the court he takes possession of all the property of the corporation, and proceeds to operate, that is, to run its trains, and to do all that was formerly done under the direction of the board of directors. In this way he uses the franchise which has been conferred by the State upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and through the court he acts as the company to the same extent, *pro hac vice*, as if the board of directors were operating the railroad. It is the franchise which is being used in both cases, only in one case it is used for the company, and substantially by it, by means of its board of directors; while in the other case the same franchise is being used, and the road is operated under it by an officer of the court, until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged, and the road returned to its former possessors, or other proceedings taken under a reorganization, as provided by law.

Taxes upon franchise—Receiver's liability.

The learned counsel for the receiver has cited the case of Com. *v.* Bank, 123 Mass. 493, as authority for the proposition that after a corporation is placed in the hands of a receiver no tax of this nature can be levied upon or collected from it. But the case is not in the least analogous to the one under discussion. In the case in Massachusetts the tax was laid upon the amount of the average of deposits in the bank for the preceding six months, which was held to be a tax on the value of the franchise thus ascertained; and it was further held that if on the day when the tax was to be laid the bank was in the hands of a receiver it was not liable to pay any part of the tax, although it transacted business during a part of the preceding six months. It will be seen, however, that the receiver was appointed under a decree of the court perpetually enjoining the bank from doing any further business, and the receiver was appointed to wind up its affairs, and the bank was at once and forever deprived of the exercise or use of its franchise. The court held that as the tax was upon the franchise, the value of which was to be ascertained on the day the tax was imposed, by reference to the amount of the average of deposits for the past six months, if on that day the franchise had ceased to exist, no tax could for that reason be imposed; and it was wholly immaterial that for a portion of the preceding six months the franchise had been

Same—Commonwealth v. Bank—Examined.

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Same—Commonwealth v. Bank—Examined.

in existence and was actually used. It thus appears that the appointment of the receiver was one of the steps to wind up a corporation which was, on the day set for the imposition of the tax, to all intents and purposes dissolved, and was no longer in existence, and hence the decision of the court was entirely unassailable. No such fact exists in the case before us. The corporation was not dissolved in form nor in substance, so far as this question is concerned. The franchise was in existence and was actually used, and no decree of dissolution had ever been pronounced. The agent who used the franchise was an officer of the court, acting under its authority, instead of the board of directors; but it was the franchise of the company which was in use at all times. In Trust Co. *v.* Railroad Co., 117 U. S. 434, the supreme court of the United States, while declining to give preference to receiver's certificates over mortgage bondholders under the facts in that case, did grant preference to the claims of the State for taxes. The taxes were, it is true, upon property; but the case is not authority for the proposition that if the tax is not a technical lien on specific property when imposed, then no preference can be granted in a case like this. We reiterate the statement of Porter, J., *In re* Receivership, etc., 3 Abb. Dec. 239, that there is great force in the claim that "the State has succeeded to all the prerogatives of the British crown, so far as they are essential to the efficient exercise of powers inherent in the nature of civil government, and that there is the same priority of right here, in respect to the payment of taxes, which existed at common law in favor of the public treasury."

Priority over bondholder's claims.

We certainly have no doubt that, in a case like this, the court can make the order (slightly modified as mentioned below), which was made herein at special term, and that the statutory remedies for the collection of taxes of the nature herein specified are not controlling in the case of an insolvent corporation and upon such facts as are herein proved. The parties hereto both agree that, as there is a fund applicable to the payment of these taxes, there is no necessity for the insertion in the special term order of the provision for issuing certificates by the receiver to raise money to pay the taxes. Without discussing or deciding the question, therefore, whether, in case the receiver had not the money on hand with which to pay these taxes, the court would order him to issue and sell receiver's certificates, and with the proceeds pay them, we shall modify the special term order by striking out such a provision. As thus modified, we think that order was correct.

Modified order.

For these reasons the order of the general term of the supreme

court should be reversed, and that of the special term be modified, as already stated, and as modified affirmed, without costs.

All concur.

Payment of Taxes by Receiver.—See Union Trust Co. *v.* Weber, 3 Am. & Eng. R. R. Cas. 583; Perry *v.* Selma, etc., R. Co., 7 Ib. 298; State *v.* Montclair, etc., R. Co., 13 Ib. 390.

Tax On Franchise of Corporation—Distinction Between Franchise and Property Tax.—Although franchises are property (San Jose Gas Co. *v.* January, 57 Cal. 614; Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556; Worth *v.* Petersburg R. Co., 89 N. C. 301), yet there is a difference between a direct tax on the property of a corporation and a tax on its franchise, measured by its earnings, which represent approximately the value of the franchise granted, or the extent of its exercise. Philadelphia Contributionship, etc. *v.* Commonwealth, 98 Pa. St. 48. The distinction between a franchise and a property tax is clearly set forth in People *v.* Home Insurance Co., 92 N. Y. 328; s. c., 3 Am. & Eng. Corp. Cas. 363.

As to taxation of franchise generally, see Porter *v.* Rockford & R. I., etc., R. Co., 76 Ill. 761; Boston Manufacturing Co. *v.* Commonwealth, 144 Mass. 598; s. c., 18 Am. & Eng. Corp. Cas. 226; *In re* Faure Electric & Force Co., (N. J.) 15 Am. & Eng. Corp. Cas. 115; People *v.* Home Insurance Co., 92 N. Y. 328; s. c., 3 Am. & Eng. Corp. Cas. 363; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530; bk. 31, L. ed. 790; s. c., 21 Am. & Eng. Corp. Cas. 13; Society for Savings *v.* Coite, 73 U. S. (6 Wall.) 94; bk. 18, L. ed. 897; Osborn *v.* Bank of United States, 22 U. S. (9 Wheat.) 738; bk. 6, L. ed. 204.

As to the taxation of a franchise granted by Congress, see California *v.* Central Pacific R. Co. 127 U. S. 1, bk. 32 L. ed. 150; s. c., 33 Am. & Eng. R. R. Cas. 451; Allen *v.* Texas & Pacific R. Co., 25 Fed. Rep. 513; s. c., 24 Am. & Eng. R. R. Cas. 18, and note 21 to 26.

BARTLETT

v.

KEIM *et al.*

(*Supreme Court of New Jersey, February* 27, 1888.)

Receiver—Personal Injuries—Limitation of Actions.—A receiver of a railroad has the right to set up, as a defence against a suit for injuries sustained from negligence in running the trains by such receiver, the statute that requires suits for such negligence to be brought against railroads within two years.

Same—Relationship to Company.—In running the roads a receiver represents or is the agent of the company.

ON demurrer. Action by Henrietta Bartlett against George de B. Keim and Stephen A. Caldwell, as receivers of the Reading

R. Co. The declaration stated that on the 17th of November, 1884, and for a long time before, the defendants, as such receivers, were in possession and had the management and control of a certain railroad, etc., which was engaged in carrying passengers, etc., from etc., for hire and reward to them, the said defendants, as such receivers, etc. Then followed an averment that plaintiff purchased a ticket at a station, and in going from that place to the train the platform gave way, being out of order and in an unsafe condition, whereby the plaintiff was hurt, etc. The second plea alleged as a defence that the cause of action did not accrue within two years next before commencement of the suit. To this plea there was a demurrer.

Bedle, Muirheid & Magie for demurrant.

B. Williamson for defendant.

BEASLEY, C.J.—The first section of the act approved 25th March, 1881, is in these words, viz.: "That all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect, or default of any railroad corporation owning or operating any railroad within this State, shall be commenced and sued within two years next after the cause of such actions shall have accrued, and not after. The defendant, in its second plea, has interposed this statutory provision as a bar to the action, and the plaintiff, by her demurrer, has raised the question whether it can have that efficacy. The counsel of the plaintiff, in vindication of the issue thus raised, contended that the statute above recited has no applicability to a suit brought against a receiver; the argument being that the provision, by its terms, has relevancy only to wrongful acts done by railroad companies, and that in this case the tort complained of was the tort of the receiver, and not that of the corporation. But, unless we are to mistake the shadow for the thing itself, this position is not tenable. This suit, in effect, is an effort to charge a suable wrong upon this railroad company. A judgment in this action would constitute an equitable claim upon the property of the corporation, and would not subject the receiver to any personal responsibility. It is the person whose property will be applied to the payment of the judgment who is the real defendant. These suits against receivers are anomalous in their nature; they are in fact the creatures of a court of equity, and are not to be assimilated, in all respects, to any of the ordinary procedures known to the courts of common law. In that case, if a judgment should be obtained, it would not constitute a lien on the property of either the nominal or real defendant. It could not be enforced by execution. In short, the action is simply the means adopted by the court of

Right of receiver to set up statute of limitations.

chancery to ascertain whether the plaintiff has a cause of action, and, if so, the amount of damages which have accrued. The receiver, within the sphere of his functions, represents the company. By virtue of such a relationship he exercises all its necessary franchises; and, in my opinion, he is its agent appointed, not by the corporate body itself, but by the law, for certain ends of its own. It is the corporation that ultimately reaps the benefits of his services. If he runs the road at a profit the result is its debts are paid, and the surplus earnings are deposited in its coffers. So far as transacting the business of the road is concerned, the receiver does precisely what the directors, if they had remained in the management, would have been required to do. I am at a loss to see, therefore, where the receiver engages employees in such business, why they are not to be regarded as the employees of the company itself. Unless this be so, it is difficult to suggest any principle on which the property of the company in the hands of the receiver is made responsible for the damages resulting from the negligences and misconduct of such employees; and, on the other hand, it is the company that receives the benefit of their services. Nor is it true, as has been sometimes said, that the company has no control over these employees; for this is to deny that the receiver is the agent of the company, for, if he be such agent, the corporation controls these servants through him. In my opinion this view best harmonizes the legal *status* of property in the hands of a receiver with the general principles of law. From this hypothesis it necessarily follows that, as the company is the real defendant, it is entitled to all the defences that would have belonged to it if it had appeared in *propria persona* as defendant on the record; and one of such defences is that given by the statute in question. No reason appears why such bar should not be held to be applicable to the present situation. Looking at the subject in the light of public policy, there seems to be no propriety in giving a longer life to a right of action arising during a receivership than is given to one arising while the road is in the hands of the directors, for if the investigation in the latter case should not be unreasonably delayed, neither should there be such procrastination in the former. The suggestion in the brief of the counsel of the plaintiff that this limitation to the suit against receivers cannot be justly applied, because these officers, as in the present instance, are often nonresidents of the State where the wrong occurred, appears to have but little weight, for when a court of equity grants an order to sue its receiver, it would also, when the necessity existed, direct such officer to enter an appearance to the action. A court of equity never withholds such aid as is within its powers, which

Receiver's relationship to company.

is necessary to effectuate its own orders. On this issue the defendant is entitled to judgment.

Liability of Receiver for Injuries.—As to the liability of receivers for injuries and torts, see Lehigh Coal & Nav. Co. *v.* Central R. Co. of N. J., *ante* 2, and note 4–6.

VANDERBILT *et al.*

v.

LITTLE.

(*New Jersey Court of Errors and Appeals, February* 2, 1888.)

Insolvent Corporations — Receiver — Chancery Court — Powers.—The powers of the court of chancery, and the receiver appointed by it, over insolvent railroads, are those expressly conferred by legislation and those necessary to the exercise of the powers expressly conferred. Power to turn into money the property of such a railroad for distribution among its creditors being expressly given, power to manage and preserve such property so as to realize the utmost for those concerned, will be implied; and for that end an insolvent railroad may be operated under the control of the court of chancery if necessary to maintain its traffic and connections or otherwise keep it in condition to be disposed of advantageously. The express power given by the act of February 11, 1874 (Revision, 196), to operate an insolvent railroad for the use of the public, is not conferred on the receiver as an independent person, but as an officer of the court. The legislative intent is to extend the power to operate the railroad previously possessed, and to require its exercise for the benefit of the public.

Same—Operation of Railroad—Contracts.—When an insolvent railroad is operated under these powers, the court may control its operation, and the chancellor may personally direct or make contracts for that purpose, or he may confer a discretionary authority to make such contracts upon the receiver.

Same—Receiver's Contracts—Remedy for Breach.—Contracts made by a receiver by virtue of such discretionary authority are, in some respects, *sui generis*. They bind the receiver, not personally, but as the representative of the trust, and are to be enforced, or redress for their breach is to be accorded out of the fund. But he who contracts with the receiver does so with the knowledge that, for any injury received thereby, he can only get redress by obtaining the permission of the court whose officer the receiver is, to sue at law, or to proceed against him in the court of chancery, and in either case by satisfying that court that the claim is well founded.

Same—Enforcement of Contract.—Upon an application for redress upon such contracts, the determination of the court is to proceed on equitable principles adapted to the administration of an insolvent estate of this character. If, on examination, the contract appears to be improvident or detrimental to the trust, it should not be enforced, nor should damages for its non-performance be awarded. But if the contractor made the contract in ignorance of its improvidence, and has in good faith prepared to perform it, and if, by its non-performance, he suffer ac-

tual loss without his fault, then the fund, the representative of which has misled him, ought to reimburse his actual loss.

Same—Oral Contracts—Examination and Acceptance—Statute of Frauds.—When contracts for the purchase of goods, etc., have been orally made by a receiver, deliveries to his agents empowered to examine and certify whether such goods should be accepted, and the receipt and acceptance thereof upon such examination and certificate and payment therefor, will satisfy the provision of section 6 of the statute of frauds, and the contract will bind the fund if otherwise enforceable.

APPEAL from Court of Chancery.

Reversing an order of the court of chancery made upon the advice of the vice-chancellor, whose opinion, *sub titulo* Lehigh Coal & Nav. Co. *v.* Central R. Co., is reported in 41 N. J. Eq. 167.

A. Q. Keasbey and *B. Gummere* for appellants.

B. Williamson for respondent.

MAGIE, J.—On February 4, 1877, the Central R. Co. of New Jersey was adjudged by the court of chancery to be an insolvent corporation, and the late Francis S. Lathrop was appointed its receiver by an order which made it his duty "to run and operate the railroads" of said company, and those owned or controlled by it. On March 24, 1877, upon the petition of the receiver, the chancellor made an order authorizing him, "in the exercise of a sound discretion, to continue the operation of the railroads owned or operated by the Central R. Co. of New Jersey," and the order directed him, for that end, among other things, to contract, purchase, and pay for such materials and supplies as might seem to him necessary and proper in the exercise of a wise discretion. During the years 1880 and 1881, and particularly the last months of 1881 and the first part of the following year, Vanderbilt & Hopkins (a firm composed of the appellants in this case) claim to have received from said receiver various orders for railroad ties and lumber, which were assented to and accepted by them under contracts for the sale and delivery of the materials comprised in said order. They also claim that they were employed by the receiver to purchase railroad ties upon commission, and that they performed their duty in that respect, and became entitled to such commission. Other claims of appellants, growing out of transactions between them and the receiver need not be specified, because they have been adjudged to be entitled to recover thereon, and no appeal has been taken from that adjudication. The appeal in this case relates to only two classes of claims, viz., those upon orders for materials and those upon purchases made upon commission. On March 3, 1882, the receiver died, while a large amount of

Facts.

these orders for materials were in progress of performance. On March 4, 1882, Henry S. Little was appointed receiver of the insolvent corporation, and on July 28, 1882, by an order of the chancellor, the same powers and authority which had been conferred upon Francis S. Lathrop, as receiver, were conferred on the newly appointed receiver. On or about June 15, 1882, the new receiver repudiated any obligation to receive the materials which appellants claim to have been ordered, and which they were then engaged in delivering, and he refused to receive such materials as appellants then had ready to deliver, and tendered to him. Thereupon appellants filed a petition in the cause, wherein the receiver was appointed, stating the facts, and praying that directions might be given to the receiver for the payment of moneys then claimed to be due, and for the acceptance of materials then ready to be delivered, and which might, from time to time thereafter, be ready for delivery under said orders. The receiver filed an answer to the petition, and testimony was taken. The petition was dismissed. The opinion of Vice-Chancellor Van Fleet, who advised the order dismissing the petition, is reported in 37 N. J. Eq. 426. The conclusion of the vice-chancellor seems to have rested on the ground that a receiver of an insolvent corporation can make no contract which will bind the trust unless such contract has been authorized in advance, or subsequently ratified by the chancellor, and that, unless receiver's contracts have been thus approved or ratified, the court of chancery may deal with them as to it shall appear to be just, and may either modify them or entirely disregard them. The order dismissing the petition declared that if the transactions between the receiver and appellants were contracts, they did not bind the trust, and were improvident, and should not be enforced against the trust.

It is to be noted that neither in the pleadings nor the opinion before referred to was any allusion made to the order of March 24, 1877, giving large discretionary powers to the receiver to contract for and purchase materials deemed by him necessary and proper for the operation of the road. The appellants appealed from the order dismissing the above-stated petition. Afterwards appellants filed another petition in the same cause, setting up, among other things, that Henry S. Little, as receiver, was indebted to them by reason of the non-fulfilment of the contracts made with the former receiver, and asking leave to institute a suit at law against Little upon the claims arising out of their transactions with the former receiver. On March 3, 1883, leave to institute such suit was granted. Thereupon suit was brought by appellants in the courts of New York. On May 11, 1883, the order granting appellants leave to sue was vacated as improvidently made, but leave was reserved to ap-

pellants to apply for another order for permission to sue in the courts of this State. Oh May 21, 1883, appellants filed another petition in said cause, and therein set forth their claims, which had been the subject of the former petitions, and recited the previous proceedings. It was therein also averred that at the time appellants filed the first petition, praying that the receiver should be directed to accept the materials, they were or should become ready to deliver under the orders. They were unaware of the order of March 24, 1877, giving discretionary power to the receiver in regard to the purchase of materials. It was also averred that it had become apparent that the contracts under which they claimed were not improvident. The prayer of this petition was that an account might be taken of all the transactions of both receivers with appellants, and of the loss and damage suffered by appellants by reason of the failure of Receiver Little to fulfil the contracts made by his predecessor, and of all moneys due appellants for materials furnished and accepted, and for a decree making such damages, losses, and moneys a prior lien on the property of the company.

This petition was referred to the vice-chancellor, and the receiver was directed to show cause on June 4, 1883, why its prayer should not be granted. On June 14, 1883, upon the matter coming on to be heard before the vice-chancellor, in the presence of the counsel of appellants and of the receiver, an order was made, by the consent of the counsel of both parties, reciting that the counsel of appellants had, in the presence of the court, agreed to discontinue their suit in New York against Receiver Little; that the appeal taken by appellants from the order dismissing their first petition should be withdrawn; that no appeal should be taken by them from the order revoking the order giving leave to sue the receiver, and that a new petition should be filed by appellants asking for any relief to which they might be advised they were entitled against Receiver Little, concerning all transactions between appellants and both receivers, with a bill of particulars showing the nature of appellants' claims; and that all controversies between the said Vanderbilt & Hopkins and the said receiver, respecting all transactions with both receivers, should be heard upon such new petition, and such further proceedings as might be taken thereon, in the same manner with respect to the rights of both parties as if no proceedings had been theretofore taken concerning the same. It was thereupon ordered that Vanderbilt & Hopkins should have leave to file a new petition for relief against Receiver Little, as to all matters in controversy, and the transactions with both of the said receivers, as if no proceedings had been theretofore taken with respect to such transactions. Thereupon appellants filed a new petition in the same cause, setting

out their claims arising out of transactions with both receivers, and praying for the relief asked for in the petition last referred to, and in addition praying that they might be decreed to be entitled to a trial by jury as to their right to recover for damages suffered by them by reason of the refusal of Receiver Little to accept the materials ordered by Receiver Lathrop, and the amount of such damages; and that they might be permitted to bring a suit at law to recover such damages, or that Receiver Little should be directed to cause an issue to be made up under the provisions of section 78 of the act concerning corporations, or that an issue should be framed to try the question of such damages. Appended to this petition was a bill of particulars of appellants' claims. Schedule 1 contained claims for materials accepted by Receiver Little upon orders made by both receivers, and for interest on delayed payments, and also for commissions on purchase of ties under the direction of Receiver Lathrop. Schedule 2 contained a statement of damages suffered, and losses and expenses incurred by reason of the refusal of Receiver Little to accept the materials ordered by appellants by Receiver Lathrop. To the petition last recited, Receiver Little filed an answer denying his liability for the contracts of his predecessor, and setting up, among other things, that he had given orders to appellants for furnishing materials to him as receiver, upon an agreement between them that no claims for damages were to be made by appellants on account of his refusal to accept the materials which appellants claimed had been ordered by Receiver Lathrop. The answer further claimed that he was justified in refusing to accept the materials, because the orders under which appellants claimed were improvident, and that appellants were not entitled to a trial by jury, either under the corporation act or in a suit at law, because estopped by having filed their petition under the order of June 14, 1883.

It is further averred in the answer that the receiver had claims against appellants which ought to be taken into account, and that all the claims of appellants, except those for interest and commissions, had been the subject of negotiation between the parties, and that, having been fixed by agreement at a specified sum, it had been agreed that $13,000 should be left in dispute upon the receiver paying the balance, amounting to $29,124.33, which amount was paid and accepted as a settlement. To this answer appellants replied, denying that they had accepted orders from Receiver Little upon the agreement that no claims for damages should be made by them by reason of his refusal to accept the materials,—they claimed a right to deliver under the orders of Receiver Lathrop,—and denying that any settlement of their claims had been made, as asserted

in the answer. Upon these pleadings appellants applied to the court for leave to sue Receiver Little at law for the damages that they claimed to have sustained as prayed for in the petition. The application was denied. The opinion of the vice-chancellor, before whom the motion was made, is reported in 38 N. J. Eq. 175. Three points were determined, viz.: (1) That before leave to sue would be granted in such a cause, the court of chancery would examine the circumstances to determine whether the matter could not be disposed of in that court; (2) that Receiver Little was not liable to be sued at law on the contracts of his predecessor; and (3) that whether the contracts of Receiver Lathrop bound the trust was within the exclusive jurisdiction of the court of chancery. The order denying the right to sue gave appellants leave to proceed in the court of chancery for such relief and remedy as they might be able to show they were entitled to. The issues made by the last petition, answer, and replication, were tried before the vice-chancellor, and a large amount of testimony was taken on both sides. Appellants were successful with respect to their claims for materials delivered and accepted, and for interest on the payments which had been deferred. They were unsuccessful in respect to their claim for commissions and their claim for damages. Regarding the former claim, it was held that sufficient proof had not been made to justify its allowance; regarding the latter claim, it was adjudged that they had no right to relief in equity for any loss sustained by the non-performance of the contracts set up in their petition, nor any remedy in the court of chancery or elsewhere for the recovery of any damages resulting from their breach. Their prayer for leave to sue at law, or for the framing of an issue under section 78 of the corporation act, or for an issue under the direction of the court of chancery, and all relief in respect to their transactions with Receiver Lathrop, except as to materials actually delivered and accepted, was expressly denied. The opinion of the vice-chancellor is reported in 41 N. J. Eq. 167.

The appeal now before us is taken from the above-stated decree, and challenges its correctness on both points upon which its decision was hostile to appellants. It therefore presents for consideration two questions: (1) Whether appellants were entitled to, and can be afforded by a court of equity, any relief by reason of the failure and refusal to accept the materials alleged to have been contracted for by Receiver Lathrop; and (2) whether they are entitled to be paid from the trust their claim for commissions. In the vigorous and able opinion upon which the decree now to be reviewed was founded, while it was admitted that the receiver had authority to make contracts for supplies

Questions presented—Vice-chancellor's opinion.

reasonably necessary to enable him to perform his duties, which would be enforced in equity against the trust, it was maintained that such contracts imposed no legal duty whatever upon the succeeding receiver, and for his refusal to perform the contracts of his predecessor no damages could be recovered at law. It was, however, further held, that an equitable obligation rested upon the succeeding receiver to perform such contracts of his predecessor under certain circumstances, and his performance would bind the trust, but that the contracts which the succeeding receiver might thus perform were only such as had been formally made, and showed upon their face or indicated how he could ascertain that they were provident and judicious. The conclusion of the learned vice-chancellor, adverse to appellants' claim, was put upon the ground that the alleged contracts were not of a character that justified Receiver Little in performing them, but on the contrary, he was justified in refusing to perform them both on that ground, and because appellants had sought the direction of the court that he should perform them, which direction the court had refused to make, from which refusal no appeal had been taken. The refusal to direct the acceptance of the materials was justified upon the case as last presented, on the ground that appellants had not shown the existence of completed contracts for the materials they sought to deliver, but that the evidence failed to show such contracts. It was further suggested that the alleged contracts were a breach of trust on the part of Receiver Lathrop, of which appellants had notice.

In coming to the consideration of the first question presented by this appeal, it must be determined preliminarily whether the appellants can be said to be barred by their own conduct from obtaining relief, if relief could otherwise be afforded them. Such a bar the court below seemed to discover in their failure to challenge, by appeal, the correctness of the refusal of the court of chancery to require the receiver to accept the materials which appellants proposed to deliver. Respondent's counsel have urged the same view in their argument. But it seems to me that the learned vice-chancellor in his opinion, and counsel in their argument, have misconceived the scope and force of the order of June 14, 1883. When that order was made, the situation of the litigation was this: Appellants had been refused the direction that the receiver should accept the materials they sought to deliver, and they had appealed to this court, and their appeal was still pending. The order of the chancellor giving them liberty to sue the receiver at law had been revoked, but they were entitled to appeal from the order of revocation. The suit against the receiver, which they had brought before the

Whether appellants are barred from relief by their own conduct.

leave to sue had been revoked, was still pending in the courts of New York; and appellants had filed another petition in the cause, asking for relief, and expressly relying upon the chancellor's order of March 24, 1877, which conferred large discretionary powers upon Receiver Lathrop, and which had not been known to them when their first petition was filed, and does not seem to have been considered by the court when it refused to direct the receiver to accept materials tendered under the contracts. It is further to be observed that upon the appeal from the order dismissing the first petition, a stipulation of respondent's counsel had been obtained, that the order of March 24, 1877, and the petition on which it was made, might be printed as part of the case on appeal as fully as if they had been set forth in appellants' original petition, so that the question of authority under that order seemed likely to be presented on the appeal, although it had not been considered below. From this recital it appears that the petition pending before the court of chancery on June 14, 1883, presented for consideration claims of appellants for relief based upon the non-performance by Receiver Little of certain alleged contracts affecting the trust made by appellants with Receiver Lathrop. A determination of these claims required a decision as to the existence and binding force of the alleged contracts. Whether they bound the trust, or the receiver, had to some extent been settled by that court in dismissing appellants' petition for directions that Receiver Little should accept materials tendered under them; but it was alleged that appellants, in presenting that petition, had been ignorant of and had not set up the order of March 24, 1877, and that the determination of the court had been reached without a consideration of its effect. While that decree has been appealed from, yet it is obvious that, if the petition before the court on June 14, 1883, had proceeded to hearing, and the court had reiterated its previous decision, appellants would have been obliged to appeal therefrom. A successful prosecution of the former appeal would not have affected an adverse decree on the second petition. A successful prosecution of the former appeal, moreover, would have produced no practical result. The materials which the first petition asked, that the receiver should be decreed to accept, had been otherwise disposed of; and the reversal of the decree, and the making of a new decree in accordance with the prayer of the petition, would have been of no further avail than to settle the principles on which the second appeal should be decided.

At this junction of this litigation the order of June 14, 1883, was made. It contains an agreement of counsel which it declares to have been made in the presence of the court. That agreement recites the previous steps in the litigation, and pro-

vides that they should be thus terminated, viz.: the suit in New York was to be discontinued, appellant's appeal then pending was to be withdrawn, and appellants were not to take the appeal they had a right to take from the order revoking leave to sue. The agreement further provided for a new petition to be filed by appellants, asking for any relief to which they might be advised they were entitled in respect to all transactions between them and each of the receivers, with the express statement that all controversies between the parties respecting such transactions should be heard upon such new petition, and the proceedings thereon, "as if no proceedings had been heretofore taken concerning the same." The order was made by the court in the terms of the agreement so recited. The plain object of the agreement was to consolidate and prepare, for judicial determination in one proceeding, all the matters in controversy, including those then the subject of various proceedings. If any decision in the proceedings then pending stood in the way of a determination of all the controversies between the parties, the agreement contemplated a rehearing in the light of all the facts, and particularly of the order of March 24, 1877, which seemed not to have been previously considered. To effect these objects, the intent was to brush away useless and impracticable branches of the proceedings, and to concentrate all controversies in a single proceeding involving every matter in dispute. The course thus agreed on was greatly to the interest of the parties. When this agreement was ratified by the order of the court, appellants presented their whole case to the court under a new petition and at great labor and expense. At the termination of the contests, they were met with the declaration that the order, so far as it had persuaded them to submit their claims for relief upon the alleged contracts, which the court had previously, by decree, refused to direct Receiver Little to perform, was a nullity and to be disregarded. They were told that they were bound to submit to or appeal from that decree. In other words, appellants were considered to be debarred from any relief because they did not prosecute, but withdrew an appeal which, by a solemn agreement ratified by the court, they were bound not to prosecute, but to withdraw. I have failed to discover any reason why such an order, under similar circumstances, might not be made in any cause pending in a court or equity. I think it would be a reproach upon the system which administers equity, to hold that a court of equity could not, in proceedings between the same parties, involving the same questions, eliminate useless litigation and concentrate all controversies in one proceeding. Such a course seems peculiarly appropriate to proceedings of this nature, where suitors approach the court for relief respecting a

Same—Order of June 14th, 1883.

fund in the hands of an officer of the court and managed under its direction. But, at all events, the determination that the court would not direct the performance of the alleged contracts could only operate as *res adjudicata* in that court in respect to claims based on the non-performance of these contracts. If, on the rehearing contemplated by the order, the new facts elicited failed to change the judgment of the court, the new decision would conform to the former determination, but would be open to review on appeal. If no appeal from the former decree had been taken, there was nothing to prevent the petitioners, under their last petition, from demanding the judgment of the court on the question at issue, and from reviewing that judgment by appeal. The withdrawal of the appeal simply left the proceeding as if no appeal had been taken. For it is not contended, and there is nothing in the case to indicate, that such withdrawal induced the receiver to take any course detrimental to himself or the trust. His consent to the withdrawal was with the design to have the question again presented and adjudicated upon. For these reasons I think nothing prevents appellants from obtaining any relief to which they show themselves entitled under their petition filed in pursuance of the order of June 14, 1883. It becomes necessary, therefore, to determine whether appellants have shown themselves entitled to any of the relief they claim under that petition, in respect to the refusal of Receiver Little to accept materials which they proposed to deliver under contracts alleged to have been made by them with Receiver Lathrop. To reach a just determination of that question, it is obviously necessary to settle what are the powers of receivers of insolvent railroad corporations; whether the transactions between appellants and Receiver Lathrop were of the nature of contracts; and, if so, how they are to be enforced, or what relief can be accorded for their breach against the trust and its subsequent receiver.

Powers of receivers of insolvent railroads—Operation of road.

The powers of the court of chancery, with respect to insolvent corporations, have been conferred by statute. Authority in this regard was formerly conferred by the provisions of the Act to Prevent Frauds by Incorporated Companies, approved April 15, 1846 (Nix. Dig. 404). The provisions of that act have been mostly included by the revisors in the Act Concerning Corporations, approved April 7, 1875 (Rev. 174). Some supplements to the first-named act, however, were not incorporated in the corporation act. One supplement, approved March 17, 1870, which gave express powers to the court of chancery to deal with insolvent railroad corporations and to lease or sell their property, was not included in the corporation act. Rev. 1281. Another supplement, approved February 11, 1874, was also not included.

Rev. 196. But these acts seem not to have been repealed. No question has been made but that by these and other statutes there has been conferred upon the court of chancery the same general powers over an insolvent railroad corporation which have been conferred on it over other insolvent corporations. In general, these powers are such as suffice to enable the assets and property of the corporation to be turned into money and distributed among the creditors. These powers are to be exercised by a receiver under the control of the court. Without other express authority, it is plain that for the proper performance of the duties thus imposed on the court, and to be performed by its officer, the latter must take charge of all the property of the corporation, and so manage and preserve it as to enable it to be disposed of most advantageously. With respect to the property of ordinary corporations, this duty can be fully performed by merely storing, insuring, and otherwise guarding the property and preserving its value until a sale can be judiciously made. Ordinarily, as was well observed by the vice-chancellor, there is no necessity or propriety in continuing the business of such corporations, and an early conversion of their assets into money, and its distribution among the creditors, is the plan of wisdom. But if the business of an insolvent railroad be arrested, and its operation stopped, it is clear that its property would not be preserved in a condition likely to realize its full value. On the contrary, a cessation of its business would be fatal to the interests of all concerned. In the absence of any expressed enactment, it seems to me, the legislation which gives authority to deal with and convert into money such property must be held to give, by implication, all needful authority to so run the road as to preserve its traffic and connections. The duty imposed requires the road to be so managed that, when ready to be disposed of, the lessee or purchaser will not acquire not merely the road-beds, rails, locomotives, and cars, but a going concern actually engaged in business. This view of a receiver's powers and duties was taken by the supreme court of the United States. Barton *v.* Barbour, 104 U. S. 126; Wallace *v.* Loomis, 97 U. S. 146. Legislative authority has also been conferred in this direction. By the act of February 11, 1874, before alluded to, it is provided that if the property of an incorporated railroad company has passed into the hands of a receiver, under the order of the chancellor, in an insolvent proceeding, the receiver shall operate the railroad for the use of the public, subject to the order of the chancellor. The authority which I have found to be implied from the previous legislation, and which extended to the running of the road, if necessary to preserve its value, in the interest of the parties concerned, is evidently enlarged by this legislation so that the road may be operated in the interest and

for the use of the public. What is the nature and scope of the authority thus expressly conferred? Is the receiver constituted a statutory agent, and empowered to do with the railroad what he thinks is proper for the puplic interest, unless restrained by the express order of the chancellor? Or, is the power conferred upon the receiver, as a mere officer of the court, to be wielded under its directions? The implied power to manage the railroad so as to preserve its value is manifestly conferred upon the officer of the court, who is therein subject to the directions of the court. When this power is enlarged, it would be most unlikely that the legislature would have designed to confer upon the receiver any separate and independent authority which he might exercise unless restrained by the chancellor. For, in that case, unless the chancellor should restrain the receiver from managing the road otherwise than as he should order, it is obvious that there would be a clashing of authority. A construction bringing such a result could only be accepted if necessary. But, when the whole legislation is considered, it seems to me that, by the obvious construction of the statute of 1874, the power to operate the railroad for the use of the public has been conferred on the receiver as an officer of the court, to be exercised by him, not, independently, but under the directions and, as the act expressly declares, subject to the orders of the chancellor.

My conclusion is, that there is nothing in this legislation giving to the contracts of a receiver in running a railroad for the use of the public any greater force than contracts made by a receiver for the preservation of the property of an insolvent railroad. On the other hand, I cannot find in the legislation in question any countenance for the notion that the contracts of a receiver, made under either the implied or express authority conferred, may be revoked or annulled at pleasure by the chancellor. Doubtless the chancellor has power to retain in his hands the administration of such a trust, and to personally direct and order each contract into which the receiver should enter. But it would obviously be impracticable to adopt such a course in running a railroad. To select and employ the necessary subordinates; to fix the term of service and the amount of wages; to contract for and purchase materials and supplies; and to anticipate, in these respects, the future needs of one of the gigantic corporations by express orders in each case;—would require the whole time of the chancellor, and could never have been intended by this legislation. It must have been contemplated that, in the performance of these multifarious duties, some degree of discretion might be accorded to the receiver. Whether a power to exercise such discretion would not be assumed to exist in

Discretionary power of receiver.

every case, without a special order, need not be considered, for it is clear that the chancellor may accord such discretionary power to a receiver by a general order, such as was made in this cause. When a receiver has thus acquired discretionary powers to operate an insolvent railroad, his position is peculiar, and the contracts he makes for that purpose are *sui generis*. Such a receiver is not exempt from liability to answer for injuries inflicted by wrong-doing or negligence of those he employs in operating the railroad; yet the liability is not a personal one, but only falls on the receiver as the representative of the property and fund managed by the court, and damages recovered for such injuries are to be thus collected. Yet, upon such liability, no suit can be brought except by leave of the court which appointed the receiver. Such leave, however, cannot be denied unless the claim appears manifestly unfounded and vexatious. Palys *v.* Jewett, 32 N. J. Eq. 302; Little *v.* Dusenberry, 46 N. J. L. 614. Analogous principles should be applied to those acts of a receiver which constitute contracts with third persons in the operation of an insolvent railroad in his charge. The liability of a receiver upon such contracts is not personal, but as a representative of the trust. The enforcement of them, or the payment of damages for his non-performance of them, must fall primarily upon the property and fund in the hands of the court. Relief upon such contracts must in all cases be originally pursued in the court of chancery. If the appropriate remedy is equitable, the court of chancery will be invoked to act in the ordinary mode. If the appropriate remedy is legal, the leave of that court to sue the receiver at law must be sought and obtained, and that leave will not be denied unless the claim appears to be without foundation. In whichever mode the court of chancery is approached, it is obvious that the first question to be determined is whether, if the alleged contracts exist, they are of a character to entitle, the party applying, to the relief asked. This determination is not to be reached upon the theory that the chancellor can disregard or annul such contracts at pleasure, but upon equitable principles applied to the management and winding up of an insolvent estate of this peculiar character.

His liability on his contracts.

If the contract has been completely performed, and its performance accepted by the receiver, and the claim is merely for compensation, relief of that nature would seem necessarily to be awarded, unless the applicant should appear to have dealt fraudulently or collusively with the receiver, to the detriment of the trust. Even if, in the judgment of the chancellor, the contract was injudicious or improvident and unreasonable, unless the contractor should appear to have contracted with notice of the improper

Rights of party contracting with receiver.

character of the contract, no just reason could be given for debarring him from the agreed-on compensation, which the receiver might, for his negligence or misconduct, be required to repay to the fund. But if the contract has not been performed, and the applicant seeks a direction for its performance, or damages for its non-performance, what course is to be taken if the contract be found to be improvident and unreasonable, although it does not appear that the contractor had notice that it was of that character? In such case, to direct the performance of the contract, or to award damages for its non-performance, would injure and despoil the trust for the mere benefit of the contractor. The course of equity, under such circumstances, seems plain. The contractor with a receiver must be assumed to know that, if he seeks to enforce his contract, it must come under the scrutiny of a court of equity, and, if it there appears to be injurious to the trust managed by that court, it would be impossible for that court to carry it out. He cannot complain, therefore, if the court decline to direct such a contract to be performed, or, if it has been repudiated by the receiver, to award damages, in the ordinary sense of the term, for its non-performance. But if the contractor has, in good faith, entered into a contract with a receiver clothed with discretionary powers, and before the unreasonableness or improvidence of such contract has been brought to his notice, or judicially determined, has made preparations for its performance, and has therein expended money or contracted obligations which, if the contract goes unperformed, he cannot, with reasonable diligence, be reimbursed or protected against, then it would be obviously inequitable to turn him away to submit to such loss, or to leave him to such redress as he might be entitled to against the receiver. If he has acted in good faith, then, although he may not be entitled to enforce his contract because the receiver has acted improvidently, yet he ought not to be allowed to suffer actual loss, but should be made whole, and, since the receiver merely represents the fund, he should be made whole out of the fund. If the conduct of the receiver require it, the court might compel him to reimburse the fund for what would thus be taken from it.

Same—Scope of statutes affecting insolvent roads.

An observation may be here made respecting the scope of the statutes affecting insolvent railroads, which will afford an illustration of the view I have taken of contracts made with a receiver, and the duty of the court in relation thereto. By those statutes the primary duty imposed upon the court of chancery is that of winding up the corporation and disposing of its property for the benefit of its creditors. The operation of the railroad is obviously merely auxiliary to that duty. Nothing in

the legislation justifies the retention of an insolvent railroad in the hands of the court for any longer period than is reasonably necessary to enable its assets to be converted into money to the best account, in one of the prescribed modes, and for the benefit of those concerned. Any discretionary power conferred on a receiver must be affected by this limitation on the power of the court. If, then, a receiver should enter into a contract for supplies to be furnished for a period so extended as to be manifestly greater than required for the performance of the statutory duty, and the contractor should apply to the court for relief, he would properly be denied any advantage from a contract which was, and must have appeared to him to be, unreasonable. So, if a contract for supplies was made for a period not otherwise unreasonable, but it was then, in fact, known to the receiver and contractor that the disposition of the railroad by lease or sale, or its release from the receivership, was imminent, a like result would follow. No relief would be afforded on a collusive contract detrimental to the trust. But if, in making such a contract, the contractor was ignorant that the power of the receiver was about to be terminated, and proceeded in good faith to prepare to perform the contract, then, although the court could not compel its performance, and ought not to award damages from the fund for its non-performance, yet, on the contractor's claim for relief for an injury suffered by the miscalculation or misconduct of the representative of the trust, the court ought, out of the trust fund, to indemnify him against actual loss.

Much of the argument before us was devoted to a discussion of the mode in which damages, resulting by the refusal of one receiver of an insolvent railroad to perform a contract made by a previous receiver, could be properly claimed and judiciously ascertained. Ordinarily an action at law for such damages is the appropriate, and indeed the peculiar, remedy. The contention is that the succeeding receiver could not be proceeded against at law because he is not legally bound thereupon either as a maker, or as the representative of the maker. In other cases the court of chancery has adopted this contention, and has entertained bills in equity against the receiver in this case, founded on the breach of contracts made with Receiver Lathrop, and have thereon assessed damages upon the ground that the contractor was otherwise remediless. Kerr *v.* Little, 39 N. J. Eq. 83; 42 N. J. Eq. 528. The view taken of the case before us renders it unnecessary to decide the question, and I mention it only to disclaim any inference that the course of practice is approved. If the claim upon such a contract ought to be determined in a court of law or by jury, I see no reason why this right should not be

Mode of ascertaining damages.

granted, either by giving leave to sue the present receiver at law, and by interdicting him from setting up any defence on the ground that the contract was not made by him, and requiring him to admit a liability thereon to the same extent as if it had been made by himself, or by directing an issue at law out of the court of chancery.

It is next necessary to examine the claims of appellants, and to determine whether they are of such character as entitles them to the relief they claim, or to any relief. Appellants claim as holders of various orders issued in behalf of Receiver Lathrop, and requiring them to deliver various materials for the use of the insolvent railroad in his charge. The orders on which the original petition was filed were 30 in number, but the bill of particulars attached to the petition now under review omits three of that number, and presents only 27 for consideration. Of these one was dated January 3, 1880; six others were dated April, 1881; five others were dated in various months of the autumn of 1881; the remainder were dated in the early part of 1882. Upon the face of each order there is a requirement that appellants should furnish to Receiver Lathrop certain specified materials. In many cases the prices at which the materials were to be furnished is not embraced in the order. In but few instances is any time fixed in the orders for the delivery of the materials. The mode in which these orders came into the possession of the appellants has been detailed in the evidence of Edward W. Vanderbilt, one of the firm of Vanderbilt & Hopkins. Although some doubt was originally expressed in the court below as to the admissibility of this witness to testify to transactions which he had in behalf of his firm with the deceased receiver, the doubt was finally resolved in favor of the admissibility of that evidence, and no question has been here raised as to the correctness of that ruling. It seems clear that the statute on this subject does not exclude such evidence, except in cases where one of the parties sues or is sued in a capacity of representative of a deceased person. Hodge *v.* Coriell, 44 N. J. L. 456; 46 N. J. L. 354. Upon Vanderbilt's evidence the course of business pursued by the receiver with his firm (as well as with a previous firm, of which Vanderbilt had been a member, and which had been succeeded by the firm of Vanderbilt & Hopkins) was as follows: When materials of the sort dealt in by these firms were, in the judgment of the receiver, acting upon the report of the heads of departments or other officers of the road, or upon his own knowledge, deemed to be likely to be required, application would be made to the firm then in existence to fix a price at which such materials would be furnished by it. If the price made was satisfactory to the receiver, he would agree to

Claims of appellants—examined.

take from said firm the materials so required, at the prices agreed on, and thereupon would direct, either personally or by an oral or written direction, or by message sent through one of the firm, the purchasing agent in his employ, to issue to the firm a written order stating in detail the kind and amount of the materials which had been the subject of the proposal on the part of the firm, and the acceptance of the receiver. Vanderbilt's testimony respecting the general mode of transacting this business, and the particulars of the orders in question, seems to be so corroborated by the evidence of the purchasing agent and other circumstances of the case, although he testifies with respect to a transaction with a deceased person, and his evidence ought for that reason to be scrutinized with the greatest care. I feel constrained to believe that the transactions he has narrated are substantially those which took place between him, representing his firm, and the receiver. If credence, therefore, be accorded to the testimony, as thus corroborated, we have the receiver contracting with appellants for the sale and delivery of certain articles at specified prices. It does not seem that the time for delivery was in general made a term of the agreement, but it does appear that the orders usually related to the anticipated needs of the road for the approaching year or season, a fact apparently known to both parties. I do not understand from the evidence that the orders were intended by the parties to form their contracts or to be evidence of the whole contract. This seems clear from the fact that many of them entirely omitted one term of the contract of the greatest importance, namely, the price. Furthermore, the orders do not upon their face purport to be contracts, nor do they directly bind the firm for the delivery of the materials ordered. However injudicious and unbusiness-like such transactions were, I think the evidence shows that the parties actually made oral contracts for the purchase and sale of the materials specified in the orders, at prices agreed on, but sometimes not expressed in the orders, and without, in general, any specific agreement as to the time of delivery, but with knowledge, on the part of the firm, of the time when the materials were to be used.

In the court below it seems to have been concluded that the evidence failed to establish completed contracts on the part of the receiver. It was suggested that the orders were more probably mere indications, on the part of the receiver, of the probable needs of the road for the ensuing season, for the benefit of the contractors, who might thus prepare themselves to make subsequent offers for the delivery of the materials when they should be needed. I am unable to perceive any such indication in the circumstances. Many of the orders were for the de-

Same—Actual contracts were entered into.

livery of railroad ties of various sorts, and it seems clear, from the evidence, that, to prepare for the delivery of such materials, the ties had, to a large extent, to be manufactured. Moreover, many of the orders required materials to to be cut into specified lengths and sizes, and there is evidence that, after they were so prepared, they were not readily salable to other parties. Under these circumstances it seems to me that the orders themselves furnish a strong proof that completed contracts between the parties had been made; for otherwise the preparation of the materials in conformity with the terms of the order would be an act of gross folly on the part of appellants, because the receiver might, at his own will, refuse to buy the materials when prepared. On the other hand, it seems equally absurd for the receiver, after issuing such orders, to remain in ignorance whether he would be able or not to procure the articles ordered as they should become necessary. All these circumstances seem to me most persuasive evidence that actual contracts were entered into between the parties for the materials specified in the various orders. That the course taken was unbusiness-like, and not such as should be adopted, must be admitted; but the evidence, in my judgment, clearly establishes that such a course was taken.

Assuming these to be contracts for the sale of goods, each of them being for a price above $30, they are affected by the provisions of section 6 of the statute of frauds. But the bill of particulars claims, and the evidence shows, that, upon each of the orders indicating the materials which were the subject of these contracts, except four, some part of the materials has, within the true meaning of that section, been accepted and actually received by the buyer. Such acceptances and receipts occurred both during the lifetime of Receiver Lathrop and after the appointment of Receiver Little. The latter emphatically denies that he had any personal knowledge that the materials accepted were delivered on account of these contracts. But the contracts had been entered into with his predecessor as the representative of the property. He had succeeded to that representation. Acceptance, as contemplated by the section in question, may be the act of an agent having authority for that purpose. Browne, Stat. Fr. § 327; Outwater *v.* Dodge, 6 Wend. 397; Allard *v.* Greasert, 61 N. Y. 1; Barkley *v.* Railroad, 71 N. Y. 205; Snow *v.* Warner, 10 Mich. 132; Simmons *v.* Humble, 13 C. B. (N. S.) 258; Morton *v.* Tibbett, 15 Ad. & E. (N. S.) 428; Bushel *v.* Wheeler, 8 Jur. 532; 69 E. C. L. 442. Both of the receivers, the evidence shows, had officers and agents charged with the duty of examining materials offered, certifying to their being proper to be received, and receiving such materials. Such

Contracts are enforcible—Statute of frauds.

agents did examine the materials offered, did certify to their correctness, and did actually receive them. The orders in question were on record in a book kept by one officer of the receiver; the bill rendered with each delivery specified upon which order the delivery was made; the certificates of correctness were put upon or appended to these bills; and it may be added that in very many instances the bill so made and certified was paid by the disbursing agent of the receiver. It would be disastrous in the extreme, to the operation of an insolvent railroad, if contracts in existence at the time of the departure from office of one receiver by death, resignation, or dismissal, and the advent of a new receiver, must be held to be, *ipso facto*, at an end, and that no contracts are thenceforth to bind or benefit the fund except such as should be made or ratified by the new receiver. Such an adjudication would deprive receivers of the power to obtain fair contracts. Nor is there any reason for such a doctrine. Those contracts are not personal, but representative. They are designed to bind, and may well bind, the fund, not only through the receiver who makes them, but also through the receiver who succeeds to his responsibilities and duties. Upon these grounds I do not think it can be doubted but that the acts of these agents or receivers, which would affect them individually if the contracts had been made in that character, will thus bind the fund which was represented by these receivers. I have thus been led to the conclusion that completed contracts existed between Receiver Lathrop, representng the fund, and appellants, which, though not expressed in writing nor signed by the person to be charged, are yet enforceable contracts, because some parts of the materials, which were the subject of such contracts, have been accepted and received, and that such contracts bind the fund, through the present receiver as its representative.

The orders on which no delivery was made, as shown in the bill of particulars, are Nos. 1786, 2173, 2175, and 2176. The contracts which thus existed, and were in the course of performance by appellants, were, after a time, repudiated by Receiver Little, and deliveries tendered thereon were rejected. It becomes necessary, therefore, to determine, on the principles before stated, whether appellants had a right to require their performance, or now have a right to redress for their non-performance. A defence to appellant's claims, made prominent in respondent's answer, was that they had been settled by an accord and satisfaction between the parties. The weight of evidence, in my judgment, in the settlement set up, did not include the claims in question. There is nothing to justify the belief that the contracts in question in this case were fraudulent or collu-

Appellant's right to require performance of unexecuted contract.

sive. Nor can I perceive sufficient ground to charge appellants with a knowledge of their being unreasonable or improvident. It is true that several of the contracts under which they make claim have remained unperformed for a long period of time, but there is nothing to show that this delay was contemplated by the parties or included in the terms of their contracts. As to the contracts made during the late fall of 1881 and the early winter of 1882, it appears in the case that on January 27, 1882, the Central R. Co. petitioned the chancellor for the discharge of the receiver and the return of the road to the company, on the ground that it was no longer insolvent. To that petition the receiver filed an answer, and the proceeding was pending at his death. It thus appears that within a few weeks after the receiver had entered into contracts with appellants for large amounts of materials, aggregating in price several hundred thousand dollars, the condition of the insolvent corporation was conceived to be such as to justify an application to relieve it from insolvency. But I find nothing in the evidence justifying the belief that the appellants had any knowledge of this conditions of affairs. On the contrary, Vanderbilt, who transacted the business with the receiver, testifies that he knew nothing of the application, and had no intimation that it was about to be made. If such knowledge had been shown, a serious question would have been raised as to the *bona fides* of his conduct in entering into contracts of such magnitude at such a time. It may be added that the subsequent history of the proceedings, as it appears in this case, clearly indicates that the road was not ready to be relieved from the control of the court and the receiver, and it was in fact continued in the hands of Receiver Little for a long period.

A careful scrutiny of the evidence has finally convinced me that these contracts, on the part of Receiver Lathrop, were, under the circumstances, so ill advised and injudicious as to be properly considered and dealt with as improvident. At the time they were made, the road had been in his hands for more than four years. It must have been apparent that the time was rapidly approaching when the trust must be wound up, either by the road becoming solvent or by its disposition for the payment of its indebtedness. Some of the orders were made after the petition for the discharge of the receiver had been filed. Moreover, assuming that the receiver calculated that the road would remain in his hands for the ensuing year, over which these contracts were evidently designed to extend, the weight of the evidence is that the materials contracted for were largely in advance of the real needs of the road, or of any needs which might be reasonably anticipated. The result is that the refusal to di-

Same—Refusal to direct performance proper.

rect Receiver Little to continue to perform these contracts was correct, and appellants cannot claim any redress by way of damages for their non-performance. Are they, then, remediless? If entitled to any relief, the general prayer in the petition will justify such relief being accorded to them. As before remarked, there is nothing in the evidence to show that appellants had any notice of the improvident character of the contracts. Nor do I think that there is anything to justify the conclusion that the contracts were not made in good faith. It is true that the materials contracted for were of enormous amount and value, but it is equally true that the materials needed, and, indeed, actually used, in the continued operation of the railroad, were enormous in amount and value. Whether such materials as were contracted for would be needed, was, to some extent, a question of judgment. Looking at the circumstances as afterwards developed, the learned vice-chancellor concluded that the orders were in excess of any needs that might be reasonably anticipated. This court, on review, finds that conclusion sustained by the weight of evidence. But the discrepancy between what needs might have been reasonably anticipated and the orders given is not so gross as to justify an inference of fraud or bad faith. It may all be well attributed to neglect in obtaining information as to such needs, or to the exercise of a careless and ill advised judgment of the receiver. When Receiver Little refused to perform these contracts, appellants had expended considerable sums of money in preparations for carrying out the contracts on their part. Materials which they had prepared, and which they tendered for delivery, were rejected; preparations for getting out materials, which were to be tendered for delivery on the contracts, had considerably progressed. It was, of course, the duty of appellants to take every reasonable precaution to preserve themselves from loss. But if, after taking every reasonable precaution for that purpose, they have been left out of pocket by their attempt in good faith to carry out these contracts, I think they are entitled to be made whole therefor. They will not be entitled to damages, nor to such profits as they would have made if the contracts had been enforced or carried out; but they will be entitled to be made whole for such loss as shall have fairly fallen upon them by reason of such acts as they did in preparing to perform these contracts, up to the time the contracts were repudiated. For such amount they should be compensated out of the fund. My examination of the evidence convinces me that the amount of such compensation cannot be properly ascertained and adjudicated by this court, and it seems necessary to remand the case to the court below for further proceedings. In my judgment, so far as this point is concerned, the decree below should be

Appellants not remediless.

reversed, and a decree made establishing the right of appellants to the measure of relief before described, with directions that the amount of the compensation to which they will be entitled shall be ascertained either by rehearing or by a reference upon the testimony already taken, and such additional testimony as the parties may produce.

It remains to consider whether the decree below is erroneous in rejecting the claim of appellants for relief, in respect to the commissions for their services in purchasing ties for the road, pursuant to an alleged agreement with Receiver Lathrop. The rejection was put upon the ground that appellants had failed to make sufficient proof of any bargain between them and that receiver, for such commissions. Upon examination of the evidence on this subject, I cannot say that the conclusion reached below appears to be so clearly wrong that it ought to be reversed. The decree in this respect must stand.

Claims for commissionson purchases.

Appellants will be entitled to the costs in this court. Unanimously reversed.

DIXON, J. (concurring).—I think that the decree appealed from should be reversed, but not for the reasons stated in the opinion of the majority of this court. The statute under which Receiver Lathrop was acting provides "that whenever any incorporated railroad company in this State shall become insolvent, and the property of such company shall have passed into the hands of a receiver, by order of the chancellor, . . . the receiver shall and he is hereby empowered to operate said railroad for the use of the public, subject at all times to the order of the chancellor; and all expenses incident to the operation of said railroad shall be a first lien upon the receipts, to be paid before any other incumbrance whatever." I regard this law as conferring directly upon the receiver the power to operate the railroad in his possession, and consequently to make all contracts necessary for its operation. Allthough, in the exercise of this power, the receiver is subject to the order of the chancellor, yet the power is derived, not from the chancellor, but from the statute, and unless there is some order of the chancellor to curtail it, the power is as broad as the terms of the act make it. I see no adequate reason for placing this power upon a footing different from that upon which derivative powers to contract stand generally, and I therefore think that all dealings of the receiver, which have the form of contracts, which are free from fraud, and which are within the scope of his statutory power, are valid contracts, and possessed of the usual incidents of contracts. The petition in the present case sets up no equitable grounds for substantial relief, but relies

Receiver's power derived from statute.

upon the dealings between the petitioners and the receiver as legal contracts. Whether such contracts were made, whether they were broken by the receiver, and what damage should be awarded to the petitioners as compensation for such breaches, are legal questions which should be settled in actions at law, according to legal rules. I think, therefore, the chancellor should have directed such actions to be brought, and if there was any technical difficulty in the way of maintaining them against Receiver Little, who succeeded Receiver Lathrop (which I do not believe), he should have directed Receiver Little to waive the objection. To hold that receivers of this class must go into the market for railroad supplies, with the understanding that the fairness of their contracts must be demonstrable to the chancellor whenever they are brought into question, or else they will not be obligatory upon the receivers, or with the understanding that, on breach by the receivers of their contracts, the contracting parties shall only be indemnified against actual loss, and shall not have such damages as they would be entitled to recover from other delinquent purchasers, seems to me to be a doctrine without solid foundation either in reason or policy.

Unanimously reversed.

Change of Incumbent in Office of Receiver—Effect on Status of Claims Arising During Receivership.—*Ex parte* Brown, 9 Am. & Eng. R. R. Cas. 723.

SAGE *v.* MEMPHIS AND LITTLE ROCK R. CO.

MEMPHIS AND LITTLE ROCK R. CO. *v.* SAGE.

(125 *U. S.* 361.)

Insolvency—Appointment of Receiver—Discretion of Court.—It is within the discretion of the court to appoint a receiver of an insolvent corporation on the application of a judgment creditor, although such creditor may not have sued out an execution upon his judgment, and have obtained a return *nulla bona*, when the petition contains allegations that the suing out of execution upon such judgment would cause useless expense and delay, and result in no benefit; that the property is mortgaged, and if sold under the mortgage would be sacrificed at nominal amounts; that a large part of the bonds secured by the mortgagees being due and unpaid, the trustees would interfere with the sale of any part of the property under execution by the plaintiff, and that if the company's property was held together and carefully used in the transportation of passengers and freight, it would produce a large income sufficient to pay all operating expenses and necessary repairs, leaving each year a large surplus to pay off and discharge plaintiff's debts.

Same—Surplus in Receiver's Hands—Rights of Creditors.—If the trustees

under a mortgage to secure the bondholders of a railroad corporation, fail to make any claim in proceedings for the appointment of a receiver, to the funds in the hands of such receiver, any surplus arising from the receiver's management is payable, not to such trustees, but to an unsecured creditor at whose suit the receiver was appointed.

Same—Claim by Creditor—Validity.—If a creditor at whose instance the receiver of an insolvent corporation has been appointed, has acquired his claim by the acceptance of an offer to purchase a promissory note, and after it had been transferred by indorsement, he came under a legal obligation to pay what he agreed upon as the purchase price, the fact that such price has not been paid does not in any way affect his claim upon the funds in the hands of receiver.

APPEALS from the Circuit Court of the United States for the Eastern District Court of Arkansas.

The decree from which these appeals are taken relates to the distribution of a fund in the registry of the circuit court arising from the operation, by its receiver, of the Memphis & Little Rock R. Co. (as reorganized). The decree directed it to be paid to the surviving trustees in a certain mortgage executed by that company, for distribution among the beneficiaries under said mortgage. Sage and the railroad company each complain of that decree; the former insisting that the money should have been applied in satisfaction of a judgment obtained by him against the company, while the latter insisted that it was entitled to receive it.

The history of the claims of the respective parties is as follows:

On the 24th day of June, 1882, the Memphis & Little Rock R. Co. (as reorganized) in an action brought by Russell Sage, on that day, in the circuit court of the United States for the eastern district of Arkansas, confessed judgment in his favor for the sum of one hundred and twenty-five thousand nine hundred and twenty-one dollars and thirteen cents, that sum being the aggregate amount, principal, and interest, of a demand note for $115.479.03 executed by that company, June 20, 1882, to the president of the Missouri Pacific R. Co., and indorsed by him to Sage, and of another note of $10,000 held by the latter against the same defendant.

On the same day on which this judgment was entered, Sage commenced in the chancery court of Pulaski county, Arkansas, a suit in equity against the Memphis & Little Rock R. Co. (as reorganized). The bill, after setting out the judgment, alleged that the entire tangible property of the company consisted of its railroad—extending from its junction with the St. Louis, Iron Mountain, and Southern Railroad, through the counties of Pulaski, Lonoke, Prairie, Monroe, St. Francis, and Crittenden to the Mississippi river—an inclined track used to transfer its rolling stock across that river to Memphis, a steamboat, certain lands,

and depot in that city, locomotives, cars, and other property, such as are usually employed in the management of a railroad; that the defendant by deed of May 1, 1877, duly recorded, mortgaged its property to trustees to secure the payment of bonds, amounting to $250,000, and maturing in instalments of $50,000 each, on the first day of May in the years 1879 to 1883, inclusive, of which instalments four were then due and unpaid; that by deed of May 2, 1877, duly recorded, defendant mortgaged its property, rights, and franchises of every description to secure the payment of other bonds with coupons attached, amounting to $2,600,000, payable July 1, 1907, and bearing interest, after July 1, 1882, at the rate of eight per cent per annum; that both of said mortgages authorized the trustees to take possession of and sell the mortgaged property upon the non-payment of any of the bonds or interest at maturity; that the aggregate amount of the mortgages exceeded the salable value of the property and franchises of every description owned by the company, or, at least, the sum for which they would sell under execution; that by reason of the existence of the mortgages no bidders could be found at more than nominal amounts for the property; that a large part of the bonds secured by the mortgages being due and unpaid, the trustees would interfere with the sale of any part of the property under execution, if the plaintiff should attempt, in that mode, to enforce payment of this judgment; and that for these reasons the suing out of execution upon such judgment would cause useless expense and delay, and result in no benefit whatever to plaintiff.

The plaintiff also alleged that if the company's property was held together, and carefully used in the transportation of passengers and freight, it would produce a large income, sufficient to pay all operating expenses and necessary repairs, leaving each year a large surplus to pay off and discharge plaintiff's debt; that such income could be made only by working the property as a unit, for purposes of transportation; consequently, the seizure and sale of it, or of any material part thereof, would destroy its capacity to produce such income, without benefit to the plaintiff, and at the same time incommode the public by destroying the use of the road in the manner contemplated by the State.

The bill further alleged that the company had hitherto failed and refused to apply its surplus income to the payment of its debts, and unless prevented would continue in that course, and apply its surplus to other uses to his great injury and loss.

The relief asked was that the court take possession of and operate the road, by a receiver, and, in that manner, seize upon the only means in reach of the law for satisfying the plaintiff's

demands; such relief to be subject to all the rights and equities of the holders of bonds or of said trustees.

The railroad company appeared and waived notice, and the court being of opinion that the relief asked was necessary, for the protection of the plaintiff's interests and rights, E. K. Sibley was appointed receiver. He was directed to take possession of the entire railroad, with the inclines, connections, tracks, depots, rolling-stock, books, papers, and all other property of the company of every kind. The company was ordered to surrender possession and the receiver directed to operate the railroad, in the usual manner, in the carriage of passengers, freights, and express matter, keeping account of all receipts and expenses, and making report of all his acts and doings, as might be required. Such surrender was made, and possession was taken by the receiver.

John L. Farwell and Robert K. Dow, as stockholders of the company, respectively intervened, October 14, 1882, and November 1, 1882, as defendants, and assailed the proceeding in which the receiver was appointed as being merely a financial expedient, by which Sage and others could make a successful speculation in the stocks and securities of the company. They charged that the company was not really indebted to Sage in any sum, and, among other things, they asked that he be enjoined from prosecuting his judgment, and that the receiver be discharged. On the 10th of November, 1882, they filed their respective petitions for the removal of the cause to the circuit court of the United States, and it was so removed.

On the 1st of December, 1883, Dow and many others, holding judgments rendered by default upon preferred mortgage and general mortgage coupons, filed their claims. These judgments aggregated nearly $200,000. Two days thereafter, December 3, 1883, an order was entered requiring the receiver at once to surrender to the railroad company all the property of whatever kind in his custody as receiver; to pay out of the money in his hands all sums and dues authorized by the order appointing him; to retain the balance subject to the order of the court; and to make full report of his acts, showing what moneys he had received and for what purpose they had been expended. The order declared that the railroad and other property in the hands of the receiver were delivered to the defendant only upon the condition—to which it assented—that it assume all the liabilities of the receiver and agree to pay and discharge, out of the property or its income, all demands which might be legally established by judgment against the receiver; in default whereof the court might retake possession, and, by proper order, enforce the payment of such judgments.

On the 12th day of February, 1884, the receiver filed a report

secured by the same mortgage, who had not obtained judgments for the amount of their unpaid coupons.

Wager Swayne for Sage, and for Memphis and Little Rock R. Co.

U. M. Rose for the trustee.

HARLAN, J.—We do not understand upon what principle the court below held that the trustees in the mortgage of May 1, 1877, were entitled, as against both the mortgagor company and Sage, to claim the net earnings of the road during the receivership. The latter was a judgment creditor of the company, and it was at his instance, in a suit commenced by him, that its property was put in the hands of a receiver. This was done because in the opinion of the court the appointment of a receiver was necessary "to protect plaintiff's interests and rights." If the grounds set forth in the bill were not sufficient to justify the appointment of a receiver, they were ample to give a court of equity jurisdiction to do so. In Union Trust Co. *v.* Illinois Midland Co., 117 U. S. 434, 458, the court said: "The co-plaintiffs with Hervey were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver, in the interest of all the creditors of all four of the corporations, to prevent the levy of executions on such property; and it prayed for a judicial ascertainment and marshalling of all the debts of all the corporations, and their payment and adjustment, as the respective rights and interests of the creditors might appear, and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits."

Grounds for appointment of receiver—Equity jurisdiction.

In the present case, it is true, Sage did not sue out execution upon his judgment and have a return of *nulla bona*. But that point has become immaterial. The railroad company made no such objection at the time the receiver was appointed. Besides, suing out an execution would, according to the facts and the admission of the parties, have been an idle ceremony, causing useless expense, and bringing no real benefit to the plaintiff. It is true, also, that Sage did not sue in behalf of all the creditors of the company or of such as might come in and contribute to the expense of the litigation. He was not bound to pursue that course. It was his privilege, under the law, to sue for his

Suing out execution immaterial—Appointment of receiver proper.

own benefit, and it was within the power of the court, for his protection as a judgment creditor, to place the property of the debtor company in the hands of a receiver, for administration under its orders. We do not mean to say that a single judgment creditor or any number of such creditors of a railroad company are entitled, as matter of right, to have its property put in the hands of a receiver, merely because of its failure or refusal to pay its debts. Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of quasi public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises. All that we say in this connection is that, under the circumstances presented in this case, the appointment of the receiver was within the power of the court. The order appointing him and directing him to operate and manage the property was not a nullity.

Collusiveness of Sage's suit —Discharge of receiver.

But it is contended that the suit instituted by Sage was collusive and an imposition upon the court; that, as held by the circuit judge, when the receiver was discharged, after having served seventeen months, and the property was turned over to the company the process of the court was not used "in good faith to collect complainant's judgment, but as a means of placing the property and business of a railroad company in the hands of the court, to be managed through a receiver, to the end that the defendant may not be subject to suits in the ordinary course of judicial proceedings, and in order to enable the plaintiff and defendant, by agreement between them, through the receiver, to apply all the earnings of the road during a series of years to the improvement and betterment of the property;" and that, consequently, the proceeding was not, in fact, an adversary one. 5 McCrary, 643, 647; 18 Fed. Rep. 571, 573. Whether this characterization of that proceeding be just or not, it is not necessary in the present case, and in the view we take of it to determine. For if it be just, the court below applied the proper remedy for the abuse of its process, that is, it discharged the receiver and turned the property back to the possession and control of the company, which, in the view taken of the facts by the circuit judge, ought never to have been disturbed. And the court proceeded, as was its duty, to dispose of the net earnings of the property, while under the management of its officer, acting under its directions.

Trustees not entitled to demand earnings —Conceding imposition.

But did the imposition, if any, practised upon the court, inducing it to appoint a receiver when one would not have been appointed had it been aware of the exact situa tion, add anything to the legal or equitable rights of the trustees in the mortgage executed by

the railroad company? Had the receiver never been appointed, and had the railroad company operated the property just as the receiver did, producing the same amount of net earnings that were in the hands of the receiver, at the time of his discharge, would the trustees in the mortgage of May 1, 1877, have been entitled to demand that such earnings be paid over to them? Clearly not. "It is well settled," this court said in Dow *v.* Memphis and Little Rock R. Co., 124 U. S. 652, 654; s. c., 33 Am. & Eng. R. R. Cas. 12, "that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in Galveston Railroad *v.* Cowdrey, 11 11 Wall. 459, 483." See also Gilman *v.* Ill. and Miss. Tel. Co., 91 U. S. 603; American Bridge Co. *v.* Heidelbach, 94 U. S. 798; Kountze *v.* Omaha Hotel Co., 107 U. S. 378; Teal *v.* Walker, 111 U. S. 242, 250.

The trustees filed their bill of foreclosure June 26, 1883, but they did not intervene as trustees in this suit until February 23, 1884, some time after the discharge of the receiver, and after the property had been surrendered to the company. Their claim and intervention shows upon its face that no part of the interest accruing upon the bonds secured by their mortgage subsequent to January 1, 1882, had been paid at the time they so intervened. By the terms of that mortgage, it was provided that, in case of continuous default by the railroad company, for thirty days, after maturity, in paying any of the sums specified in the interest coupons, the principal sums in all the bonds "shall immediately become due and payable," and, thereupon, the trustees, upon the written request of the holders of a majority of said bonds, "shall enter upon and take possession of all and singular the charter, franchises, and property hereby conveyed, and shall and may sell the same to the highest bidder for cash in hand," etc. There was no moment pending the receivership when these trustees, upon the request of the holders of a majority of the bonds, might not have appeared in this suit, or in a separate suit in the same court, and asked that the receiver hold for them as well as Sage, or that he be discharged and they put in possession of the mortgaged property, for the purposes of sale, pursuant to the mortgage. Neither they nor the bondholders elected to pursue that course. It may be that their action was dictated in part by the fact, found by the master, that the railroad, the principal security for their debts, was being largely improved during the receivership out of the income of the property, and that no part of that income was

being diverted to pay Sage's judgment or the debts of the company. If the trustees, pending the receivership, had intervened and asked possession of the property, they might perhaps have been entitled, as against general creditors, to the income of the property thereafter accruing, upon the principles announced by this court in Dow *v.* Memphis and Little Rock R. Co. (as reorganized), 124 U. S. 652; s. c., 33 Am. & Eng. R. R. Cas. 12. But we do not perceive any legal ground upon which they are entitled to the net earnings of the property, while it was in the hands of the receiver, in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors. His suit was, in effect, an equitable levy for his benefit, upon the net income of the property. Other creditors, who filed their claims, based upon judgments, gain nothing, as between themselves and Sage, by the fact that their judgments were rendered upon coupons, which were secured by lien upon the mortgaged property. Neither they nor their trustees, prior to the termination of the receivership, chose to assert this lien. Nor did they, pending the receivership, ask that the receiver should, from and after their appearance, hold for them as well as for Sage. They took action as simple contract creditors, whose claims were reduced to judgment. If the bondholders, when intervening simply as judgment creditors, acquired an interest in the fund, they could not, upon any recognized principles of equity, deprive the creditor, at whose instance and for whose benefit the receiver was appointed, of his priority of right, arising from the institution of suit for the purpose of reaching the income of the debtor's property. The judgments at law obtained by bondholders upon their coupons were all rendered after the receiver took possession of the property; some in the spring of 1883, the larger part of them in October and November of that year, just before the receiver was discharged.

These conclusions are not affected by the fact that Sage, in his bill, alleges that he seeks relief, subject to all the rights and equities of the holders of bonds, and of their trustees. It was only meant by this to give assurance that he had no purpose, in asking the relief he did, to affect injuriously their security, or the liens created in their behalf by the mortgages referred to. Taking the allegations of his bill to be true, he sought only, by means of a receivership, to reach the net income of the railroad company in satisfaction of his debt.

But it was insisted, in argument, that the judgment which Sage obtained against the railroad company was fraudulent in that the debt for which it was rendered was fictitious; that he never in fact owned a real note ex- Validity of Sage's claim.

ecuted by that company, based upon any valuable consideration whatever. The record not containing the note, or a copy of it, some question was also made, in argument, if we did not misunderstand counsel, whether any such note was ever in existence. We could not sustain these propositions without reaching the conclusion that there had been the most shocking perjury upon the part of witnesses in this cause—a conclusion which the evidence does not warrant. The judgment which Sage obtained by confession of the defendant company, in the Circuit Court of the United States, recites that it appeared to the court, "as well from the promissory notes with the complaint filed, as from the said confession and consent, that the defendant is indebted to the plaintiff in the sum aforesaid," etc. The record shows that Sage, under date of June 20, 1882, addressed to the president of the Missouri Pacific R. Co. a communication offering to give fifty cents on the dollar, payable in ninety days, for its debts and note "against the Memphis & Little Rock R. Co. (as reorganized), amounting, as I am informed, to the sum of $115,479.03, your company guaranteeing that the said amount is justly due to it from the Memphis & Little Rock R. Co." The records of the former company recite that, on motion of Mr. Dillon, seconded by Mr. Eckert, that offer was accepted, and that said debt and note "are hereby transferred and assigned to said Sage, and that the president be, and he is hereby, authorized to execute any further assignment of said debt that counsel may advise, and also to indorse and deliver said note to the said Sage." Sage swears, in his deposition, that he purchased, held, and brought suit upon said note. The treasurer of the Missouri Pacific R. Co. testifies that his company did, in June, 1882, hold the note of the Memphis & Little Rock Co. (as reorganized) for $115,479.03, given by the latter company for advances made by the Missouri Pacific R. Co. to meet coupons of the former company. It is true that, independently of the evidence furnished by the note, it does not clearly appear that the advances made by the Missouri Pacific R. Co. to the other company aggregated the full amount of the note. But this deficiency in the proof is more than made good by the fact that the note was given, and that the Memphis & Little Rock R. Co. (as reorganized) confessed judgment for its amount, and does not now dispute the debt, although by its appeal it claims that the fund in court should be paid to it, rather than applied to Sage's judgment.

It is contended that Sage does not show that he has ever paid to the Missouri Pacific R. Co. the amount he agreed to give for the note of the Memphis & Little Rock R. Co. (as reorganized). Proof of that fact was not vital in the case. After the acceptance of his offer to purchase the note, and after it had been transferred, by indorsement, to him, he came under a legal obli-

gation, which he recognizes, to pay what he agreed to pay. He cannot escape that obligation.

For the reasons stated, we are of opinion that the decree below was erroneous in that it did not, in the order directing the distribution of the fund remaining in court, give a preference to the judgment at law obtained by the appellant Sage.

The decree reversed and cause remanded, with directions for further proceedings consistent with this opinion.

See Dow *v.* Memphis & L. R. R. Co., 33 Am. & Eng. R. R. Cas. 12.

RYAN

v.

ANGLESEA R. CO.

(*New Jersey Court of Chancery, February* 16, 1888.)

Receiver—Mortgage Foreclosure—Duty to Answer.—It is the duty of a receiver of an insolvent railroad company to file an answer to a bill to foreclose a mortgage, although the plaintiff in such bill may be the owner of all the claims against the corporation, and has, by agreement with the receiver, entered into possession of the railroad, and also of all the assets of the company.

Same—Sufficiency of Answer.—In an answer to a bill to foreclose a mortgage, it is not enough to say in response to a material allegation that "having no personal knowledge thereof, leaves the said complainant to make such proof as he may be advised," since the respondent in such bill may have information and belief of a strong character, especially when it is considered that he is the receiver of the corporation, and has entered into an agreement with the complainant by which the latter has obtained possession of the mortgaged property.

Same—Validity of Bond—Interest of Receiver.—The fact that the receiver of an insolvent corporation has not been discharged by order of court, confers upon him sufficient interest to justify him in setting up a defence to a bill to foreclose a mortgage upon corporate property, which goes to the validity of the bonds upon which the suit is brought, although he may have parted with the possession of the corporate property to the mortgagee, the latter having become possessed of all the claims against the corporation.

Same—Sufficiency of Defence—Receiver's Costs and Expenses.—In a bill to foreclose at the instance of a mortgagee who has acquired all the claims against a corporation, and has been allowed by the receiver to enter into the possession of the corporate property and assets, the receiver cannot set up as a defence an agreement with the complainant by which the receiver was to hold the road for the benefit of the complainant, and the latter was to pay all the receiver's costs and expenses, which he has not

done, such agreement not being intended to secure to the receiver the right to set off his fees and costs against the amount due on the mortgage.

BILL to foreclose a mortgage. The Anglesea R. Co., by its board of directors, authorized the issuing of bonds for $40,000 to be secured by a mortgage given by it to the Guarantee Trust & Safe Deposit Co., of Philadelphia. The company having become insolvent, a receiver was appointed, and the complainant in the present action now files a bill to foreclose the mortgage and sell the property, the receiver being made a party defendant thereto. The complainant moves to strike out parts of the answer filed by the receiver.

J. J. Crandall for complainant.

S. H. Grey for defendant Bodine.

BIRD, V.C.—Bodine has been appointed receiver of the defendant company, and, judging from the pleadings, had so far discharged his trust as to deem it safe to allow the complainant, who had become the owner of all the claims against it, to take charge of the railroad of the defendant company, over which he had been given command, and also of all the assets of the said company. He not only thus surrendered everything by his acquiescence, but proceeded to treat with the complainant with respect to the payment of his costs and his compensation, and actually entered into an agreement covering all these matters. Now, while in this position, the complainant, who treated with Bodine as receiver, calls upon him to answer, after he had rescued from him all that he could possibly hold in that capacity, except some indescribable, or as yet indefinable, show of title; and Bodine, the receiver, who had thus relieved himself of all the property transferred to him in trust, as far as he could without the aid of the court, undertakes to make such answer.

Case stated.

1. It is said Bodine has no interest except as receiver, and, as such, he has no interest that justifies him in answering. Then why make him a party, and call upon him to answer? It was his duty to answer, if only by way of disclaimer. True, if no case was made against him, he might have demurred, but he could not safely keep silent.

Receiver's duty to answer.

2. But, since he does answer, what is required? Is it enough to say, in response to a material allegation, that, "having no personal knowledge thereof, leaves the said complainant to make such proof as he may be advised"? I think that this is no answer at all. He would have been as fully protected had he omitted to mention the subject-matter. It is not enough to say that he has no knowledge, since he may have information or belief of very strong character.

Sufficiency of answer.

And this is especially applicable in this case, when it is considered what position the receiver has occupied. Reed *v.* Insurance Co., 36 N. J. Eq. 146; Stew. Dig. supp. 250, pl. 451. If bills may be thus answered, then answers had better be dispensed with.

I think the first and second exceptions to the answer are well taken.

3. So much of the answer is excepted to as denies that there is anything due on the bonds secured by the mortgage, and avers that they were made or issued without authority of law; and that no consideration was ever given therefor, by the complainant or any other person; and they are void, and should be surrendered for cancellation—First, because the answer does not set forth the facts which, if true, would make it clear that the bonds were issued without warrant; second, because it does not show how the complainant became possessed of the bonds without consideration; third, because it presents no facts showing fraud or collusion on his part; and, fourth, the receiver discloses no interest in himself to justify such a defence. If the last reason assigned be sufficient, then, perhaps, all the rest would stand; but, in my humble judgment, until the receiver is discharged by the order of the court, the court is obliged to listen to him, as the representative of the interests which the court appointed him to guard and superintend, especially when he is called upon to speak with reference to a matter which affects such interests in the whole, and in every part. Having a right to answer on this head, the question recurs, is this third exception well taken? In my judgment it is not, in all respects, and therefore must fall. Without considering the other branches of the proposition, it is enough to say that the allegation that no consideration was ever paid by any one therefor is broad enough to give the defendant a standing on that issue. Can the court bind a corporation hand and foot, and turn it over to the care of a receiver, taking from it all capacity, for the time being, to perform any of its ordinary functions, and then, when an alleged creditor prosecutes a large claim, and shows that he has possibly lulled the receiver into indifference by an agreement, forbid the receiver making an answer to a point that affects the whole consideration of the claim? While he is such receiver he has a most high and solemn duty to discharge, and the court can do no less than aid him. If, in truth, his duties be all performed, then let him be discharged in due course; and then it may be that others, having rights or interests, will desire to be heard; and, if so, it cannot be said that a receiver or the court of chancery stands in the way.

Validity of bonds—Interest of receiver.

4. The seventh paragraph of the answer avers that the com-

plainant is interested in the lands on the line of the railroad, and sets up the agreement between the complainant and the receiver, by which it appears that the receiver was to hold the road for the benefit of the complainant, and the complainant was to pay all the receiver's costs and expenses, which, it is said, he has not done; and all of this is excepted to, and I think properly. It may be a very interesting disclosure to the interested, but it has nothing to do with the validity of the mortgage or the question of consideration. And, since it does not appear that the agreement intended to go so far as to secure to the receiver the right to set off his fees and costs against the amount due on the mortgage, such set-off cannot be allowed, under our practice; supposing it were possible to inject the receiver into the place of the debtor, the defendant company, for any such mere matter of convenience.

Sufficiency of defence—Receiver's costs and expenses.

I think the first, second, and fourth exceptions are well taken, but not the third.

Counsel for defendant pressed the point that, since the answer was asked for without oath, there could be no exceptions to it, it being without oath. This ought not to prevail. The only innovation the legislature made was to permit the complainant to call for an answer without oath. It did not go further, and say that, if the complainant does so, he shall not be permitted to except to the answer filed in response thereto; and, besides, the practice continues as of old. The complainant is entitled to costs.

HERRING

v.

NEW YORK, LAKE ERIE AND WESTERN R. CO. *et al.*

(*New York Court of Appeals.*)

Railroad Mortgage—Foreclosure—Parties—Unsecured Creditors.—Unsecured creditors are not necessary or proper parties to a suit to foreclose a mortgage of a railroad, and have no right to intervene therein, but are bound by an adjudication against the mortgagor.

Same—Proceeding for Dissolution—Temporary Receiver—Title.—A temporary receiver appointed in an action at the instance of the attorney-general, brought upon the ground that a railroad corporation is insolvent, is not vested with the title to the property of the corporation, but is a mere custodian and manager of its property and franchise under the direction of the court, and, so being, is not a necessary party to a suit to foreclosure of a mortgage upon the railroad.

Same—Action by People.—If the attorney-general commences an action in the name of the people against an insolvent corporation for the purpose of effecting its dissolution and winding up, and after appointment of the temporary receiver therein, the mortgagee is permitted by the court to commence a suit to foreclose his mortgage upon the road, the people are not necessary parties to such foreclosure suit, although the court in its discretion might permit them or the receiver in their action to intervene therein upon application for that purpose.

Same—Mortgaged Property—Finality of Judgment.—If in proceedings to foreclose a mortgage upon railroad property, the foreclosure judgment determines that certain stocks and bonds are subject to the mortgage and liable to be sold with the mortgaged premises, such judgment imports absolute verity, and neither the railroad company nor any of its general creditors can be heard to impeach it in a collateral proceeding.

Same—Commencement of Proceeding—Discretion of Court.—If an action has been commenced by the attorney-general on behalf of the people, alleging that a railroad corporation is insolvent, and praying for its dissolution, and a temporary receiver is appointed therein, it is within the discretion of the court, notwithstanding such action, and the appointment of a receiver, to authorize the commencement of foreclosure proceedings, to appoint a receiver therein to supercede the receiver appointed in the people's action, to transfer all the duties of the receiver in that action to the receiver appointed in the foreclosure action, and to order all the property covered by the mortgages to be delivered to such receiver.

Same—Confession of Judgment—Validity.—The New York statute which declares that all judgments confessed by the corporation after the filing of a petition for the dissolution thereof, shall be absolutely void as against the receiver, who may be appointed on such petition and as against the corporate creditors, is aimed at the confession of judgments made by the corporation as its voluntary act without the interference of the court, and does not affect a consent by the corporation to the entry of an order of sale in foreclosure proceedings, which rest upon the action and order of the court at the regular term and session thereof, although such consent may have been made after action brought for dissolution of the corporation.

Same—Action for Dissolution by People—Intervention of Creditors.—The general creditors of a corporation have no right to notice of, and no absolute right to intervene or to a hearing in, an action brought by the attorney-general on behalf of the people for the dissolution of an insolvent corporation, until after final judgment in such action.

Same—Conclusiveness of Judgment.—An action was brought in the name of the attorney-general on behalf of the people for the dissolution of an insolvent railroad company, and a temporary receiver was appointed therein. Thereinafter, by leave of the court, foreclosure proceedings were commenced by the mortgagees of the company, and the property was sold. In the order directing the delivery of the property to the purchasers, the court inserted a proviso that the delivery should be subject to all the rights of the people as they might be ascertained by the attorney-general in the people's action. The question having arisen whether certain stocks and bonds possessed by the railroad company, formed part of the general property sold at the forclosure sale, the matter was sent to a referee to examine and report. As the result of the report, the court determined that the stocks and bonds formed part of the property in the mortgages, that they were properly sold with the mortgaged premises; that the purchaser at the foreclosure sale obtained good title to them, and that they never in fact came into the possession of the receiver appointed in the people's action. *Held*, that the judgment of the court was binding upon the general creditors of the corporation, although no final receiver had

been appointed in the people's action, and although no final judgment had been rendered therein, and that the fact that the same person had been appointed receiver in the foreclosure proceeding, and temporary receiver in the people's action, did not effect the validity of the judgment.

Same—Title of Receiver—Relation Back.—The equitable rule which gives the receiver title to the property, by relation back, as of the commencement of the action, aims at preventing fraudulent and unjust dispositions of property, and does not confer upon the receiver a title which will override a disposition of the property made by order of court before the date of his appointment.

Same—Final Receiver—Rights of Creditors.—Under the New York statutes, the final receiver appointed for the winding up of an insolvent company, is not bound to consult the general creditors of the company in the prosecution or defence of actions, but is subject solely to the order of the court in taking possession of the insolvent estate, commencing and settling suits and compromising claims.

Same—Powers of Court of Equity.—The powers conferred upon courts of equity by article 2, title 4, chapter 8, part 3, section 38 of the New York Revised Statutes, in actions for the dissolution of corporations, is not affected by the chapter of the Code of Civil Procedure, which substitutes actions in place of writs of *scire facias* and *quo warranto*.

APPEAL from the General Term of the Supreme Court, First Department.

Action by William Herring against the New York, Lake Erie & Western R. Co., the Farmers' Trust and Loan Co., and Hugh Jewett, receiver of the Erie R. Co. The following statements, furnished by Earl, J., sets out the facts:

The plaintiff commenced this action on behalf of himself and all other creditors of the Erie R. Co. similarly situated, and made parties defendants the New York, Lake Erie & Western R. Co., the Farmers' Loan & Trust Co. and Hugh J. Jewett, receiver of the Erie R. Co.

In his complaint he alleges that prior to its dissolution the Erie R. Co. was a corporation organized under the laws of this State; that in the year 1870 (to secure the payment of its bonds, amounting to about $16,000,000) it executed and delivered to the Farmers' Loan & Trust Co., as trustee, a mortgage of its railway and certain property then owned by it, which railway and property were described in the mortgage in the following words, to wit:

"All and singular the railway of the party of the first part, from and including Piermont on the Hudson river, to and including the final terminus of the said railway on Lake Erie, and the railway known as the Newburgh Branch, from Newburgh to the main line, and also all that part of the railway designated as the Buffalo Branch of the Erie railway, extending from Hornellsville to Attica, in the State of New York, and also all other railways belonging to the party of the first part in the States of New York, Pennsylvania and New Jersey or any of them, together with all the lands, track, lines, rails, bridges, ways,

buildings, piers, wharves, structures, erections, fences, walls, fixtures, franchises, privileges and rights of the said company, and also all the locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured or unmanufactured materials, coal, wood and supplies of every kind, belonging or appertaining to the party of the first part, and all the tolls, income, issues and profits arising out of the said property, and all rights to receive or recover the same; also all the estate right, title and interest, terms and remainder of terms, franchises, privileges and rights of action, of whatsoever name or nature, in law or in equity, conveyed or assigned unto the New York & Erie R. Co., or unto the Erie R. Co. by the Union R. Co., by the Buffalo, New York & Erie R. Co., by the Buffalo, Bradford & Pittsburg R. Co., by the Rochester & Genesee Valley R. Co., and by the Long Dock Co."

That afterward, in 1874, to secure the payment of other bonds, amounting to about $24,000,000, it executed to the same trustee another mortgage upon its railway and property, by the same description contained in the prior mortgage.

That about the 25th day of May, 1875, an action was brought by the attorney-general, in the supreme court of this State, in the name of the people as plaintiffs, against the Erie R. Co., its directors and certain trustees under various mortgages, including the Farmers' Loan & Trust Co., as defendants; that the relief prayed for in that action, among other things, was that the corporation should be dissolved and be wound up, that the plaintiffs should have judgment accordingly, and that in the meantime, while the action was pending, Jewett, president of the company, should be appointed receiver to take, hold and possess, under the immediate authority and direction of the court, the franchises and property, with full power to operate the road and to preserve its franchises and corporate existence until final judgment, and with such other general powers as it is usual and in accordance with the rules and practice of the court to confer upon receivers in like cases; that on the 26th day of May, 1875, on the application of the attorney-general in that action, Jewett was appointed receiver of the company, in pursuance of the prayer of the complaint; that, by virtue of such appointment, Jewett undertook the duties of the receivership, and all the estate of the Erie Co. and its franchises thereupon became vested in him as receiver, to be administered and distributed by him in accordance with the statutes in such case provided.

That about the 15th day of June, 1875, the defendant, The Farmers' Loan & Trust Co., as trustee, commenced an action against the Erie R. Co. for the foreclosure of the two mortgages above mentioned; that in that action the Trust Co. was sole

plaintiff and the Erie R. Co. and the trustees under prior mortgages were the only defendants; that subsequently the summons and complaint in that action were amended so as to make certain creditors of the Erie Co. co-defendants therein; but Jewett, as receiver in the people's action, was at no time made a party to that action; that the complaint in that action alleged, among other things, the insolvency of the Erie Co.; that it had made default in the payment of the interest falling due upon its bonds; that to the extent of the rightful interest in the mortgaged premises of the Trust Co. as the mortgagee, its rights were in law and equity superior to the rights of the People of the State of New York; that the Trust Co. was entitled to have the mortgaged premises foreclosed and sold for the payment and satisfaction of the respective debts to secure which premises were mortgaged to it; and that the prayer of the complaint demanded that an accounting should be had as to the bonds outstanding under the mortgages; that Jewett should be appointed receiver of the mortgaged premises and property in that action, and that the mortgaged premises and property should be sold and the proceeds applied for the payment of the mortgage debts, and that the complaint further demanded in words following, to wit: "That an inquiry may be had and an account taken of and concerning all and singular the premises and property so mortgaged to this plaintiff as aforesaid, in order that it may be fully and at large ascertained whereof the said mortgaged premises consist;" that on the 15th day of June, 1875, Jewett was appointed receiver in that action of all the property covered by the two mortgages.

That the estate of the Erie R. Co. at the time Jewett was appointed receiver in the people's action, consisting not only of the railway and the property described in the two mortgages, but also of a large amount of other property, such as bonds and stocks in other corporations, which property was not appurtenant to the mortgaged premises, not subject to the lien of the mortgages or either of them, and not in any manner necessary for the practical operation of the mortgaged premises, or to the use, management or maintenance thereof, amounting to many millions of dollars in value; that part of such property had been acquired by the Erie Co. subsequently to February 4, 1874, the date of the second mortgage; that the property not subject to the lien of the mortgages constituted a large and valuable fund applicable to the payment of the general and unsecured creditors of the Erie Co.; that the Farmers' Loan & Trust Co or its attorney, admitted in the foreclosure action the existence of such fund and the necessity of an accounting with respect to the same, on a motion in that action in which it was made to appear to the court by the affidavit of such attorney, on or about the

6th day of April, 1876, that there were in the hands of Jewett, as receiver, stocks and bonds as before mentioned, representing interests in other corporations to the nominal amount of more than $22,000,000, which belonged to the estate of the Erie Co.; that an unascertained portion of such securities was covered by the two mortgages; that another unascertained portion had been acquired with moneys supplied by the respective parties for whom the Farmers' Loan & Trust Co. was trustee; that advances had been made upon or against a further portion thereof out of the income of the mortgaged property in the hands of the receiver; that the receiver had paid out of the income of the mortgaged premises in his hands certain debts of the Erie R. Co., constructed prior to the appointment of the receiver, for labor, salaries and supplies which ought of right to be reimbursed to the mortgage creditors out of the assets of the Erie Co. not covered by the mortgages; that certain resulting trusts existed in favor of the mortgage creditors in such securities; and that such securities or the proceeds thereof, in case of their sale, should be dealt with by the receiver as a part of the general funds in his hands under the several mortgages; and that it was alleged in the affidavit that it was impracticable at that time to take, state and adjust the accounts, and to finally account in respect to the matters above referred to, and that such final accounting and adjustment could only be had with due regard to the rights and interests of the parties upon the accounting preliminary to the final decrees, and by the final decrees to be made upon the basis of such accounting; that an order was made on that motion in the foreclosure action, on or about the 6th day of April, 1876, authorizing the receiver to treat the fund as a part of the general fund and estate embraced in the two mortgages, "without prejudice to any equitable rights and interests of the respective parties which may be established on final accounting."

That during the pendency of the forclosure action, the holders of the bonds and stocks of the Erie Co. formed a plan for the formation of a new corporation in which their interests were to be represented; but no provision whatever was made in the plan of reorganization, for the unsecured debts or obligations of the Erie Co.; that the reorganization was consummated in pursuance of the plan and the sanction of the court and with the co-operation of Jewett, as receiver, in the foreclosure action, and that the new organization thus formed is the defendant, the Lake Erie & Western R. Co.

That such proceedings were had in the foreclosure action that judgment of sale was rendered therein on or about the 7th day of November, 1878, and that the decree recited among other things as follows: "That the receiver in the course of his receivership has lawfully acquired and become possessed of a large

amount of stocks in other corporations, bonds and other obligations for the payment of money, a large part of which has been lawfully and properly pledged by him to secure the payment of money borrowed by him, which he was authorized to borrow for the general purposes of his receivership, and which will probably remain to a greater or less extent so pledged at the time of the sale of the mortgaged premises; that all or nearly all of such stock, bonds, obligations and securities are embraced and described in the inventory of the mortgaged premises and property made and filed in this case by the receiver in pursuance of the order of this court; that the said stocks, bonds, securities and obligations are held by the receiver as part and parcel of the property and premises mortgaged to the plaintiff, and as the product of the rents, profits and issues of the mortgaged premises during the said receivership, subject, however, to the liens existing thereon by reason of such pledge or pledges thereof as hereinbefore stated; that the referee appointed to sell the mortgaged premises should be authorized at the request of the plaintiff's attorney to expose for sale and sell, as part of the mortgaged premises, all and singular the said stocks, bonds, obligations, accounts and evidences of indebtedness and other choses in action of which the receiver may have become lawfully possessed in any way or manner during his receivership; subject, however, to any lawful lien or liens existing thereon, whether created by the receiver or otherwise."

That it was by the foreclosure judgment ordered, adjudged and decreed, among other things, that sale be made of "all and singular the mortgaged premises, franchises, and property, both real, personal, and mixed, mentioned in the complaint in this action and hereinafter mentioned:" being the same premises and property described in the two mortgages, with the following addition: "And this description is to be understood as embracing and including all and singular the choses in action, stocks, bonds, book accounts, bills receivable, and other evidences of indebtedness, leasehold estates, contracts, and other property hereinbefore mentioned;" that a sale was had under the judgment by a referee appointed for that purpose on the 24th day of April, 1878; that the terms of sale as announced by the referee described the property to be sold by the words of description contained in the mortgages with the addition of the following words, namely: "Embracing and including all and singular the choses in action, stocks, bonds, book accounts, bills receivable and other evidences of indebtedness, leasehold estates, contracts, and other property mentioned and described in the lists and schedules to be exhibited at the sale, and contained and described in the receiver's inventory of the real and personal property of the Erie R. Co., also to be exhibited at the sale, not consumed or disposed of by the receiver

in the discharge of his duty prior to the sale, and including all property of every kind and description acquired by the receiver during his receivership, with the proceeds of the rents, profits, and issues of the mortgaged premises since the making of the said inventory, and not embraced therein, and excepting therefrom such portions thereof as will be declared excepted at the time and place of the sale."

That the receiver's inventory of the real and personal property of the Erie R. Co. referred to in the terms of sale was exhibited at the sale, and it contained all the mortgaged premises, and also all the other assets, real and personal, above described, not covered by the mortgages and which were held by Jewett, as receiver, in the people's action for the benefit of the unsecured creditors of the company; that there were present, and exhibited at such sale, lists, including not only the mortgaged premises and property, but also other claimed estate and assets of the company which were not covered by the mortgages; that the sale was made to certain trustees under the reorganization plan; that on or about the 25th day of April, 1878, an order was entered in the foreclosure action, confirming the sale, and the report thereof by the referee, and it was thereby ordered "That the said referee be and he hereby is ordered and directed forthwith to execute and deliver a proper deed or deeds of conveyance of all and singular the said premises, franchises, and property so as aforesaid sold or intended so to be, to the said purchasers or their assigns, on their complying with the conditions on which, by the terms of said sale and by said decree, such deed or deeds were to be delivered."

That on or about the 26th day of April, 1878, the referee executed and delivered to such trustees, a referee's deed of the property sold which described it in the words following, to-wit: "All and singular the property, franchises, and estate whether real, personal or mixed, and wherever situate and whether within or without this State, embraced and included in the said judgment, and authorized and directed to be sold therein and thereby, of which said property, franchises, and estate, real, personal, and mixed, the following is the general and the best practical description; that is to say"—then, in addition to the description of the premises in the mortgages, were the following words: "This description is to be understood as embracing and including all and singular the choses in action, stock, bonds, book accounts, bills receivable, and other evidence of indebtedness, leasehold estates, contracts, and other property in the said judgment mentioned or therein directed to be sold," with some exceptions not material now to be mentioned; that the Erie R. Co. also executed to the trustees a deed, of even date with the deed mentioned, of the same premises described as in the deed

of the referee; that thereafter, on the 27th day of April, 1878, the defendant, The New York, Lake Erie & Western R. Co., was incorporated in pursuance of the reorganization plan, and thereupon the trustees executed and delivered to it a deed of the property held by them under the deeds of the referee and of the Erie R. Co. above mentioned, describing the same in the words used in those deeds.

That on or about the third day of May, 1878, Jewett, as receiver, presented to the supreme court in the foreclosure action a petition for an order authorizing the delivery by him to the New York, Lake Erie & Western R. Co., of the property sold in the foreclosure action; and that thereupon on that day an order was made in the foreclosure action in which, among other things, it was ordered "That the said receiver do transfer, deliver and surrender to the said New York, Lake Erie & Western R. Co. all the property and franchises whereof he is now possessed as receiver in this action, and which were embraced, or intended to be embraced in the judgment of foreclosure herein, subject to the reservations and exceptions hereinafter specified, and subject to all and singular the rights of the people of this State in and to the premises, or any part thereof, as the same may be ascertained on due inquiry and examination by the attorney-general, in the action of the people of this State against the Erie R. Co., now pending, to the end that such rights and interests may be as fully protected as if this transfer had not been ordered and directed; and that upon such transfer, delivery and surrender, the said receiver be and he is hereby absolutely and forever discharged of and from any and all liability as receiver in this action, for the property and franchises so delivered, transferred, and surrendered."

That on or about the first day of June, 1878, Jewett, as receiver, delivered to the New York, Lake Erie & Western R. Co. all the property referred to in that order, or the greater portion thereof, subject, however, to the terms of the order, and took therefor a receipt from the New York, Lake Erie & Western R. Co. containing a list of certain shares of stocks and bonds in other companies and other personal property; that none of the property specified in that list was as matter of fact or law embraced in or covered by any of the mortgages of the Erie R. Co., or subject to the lien thereof, or appurtenant to the mortgaged premises; nor was any of the same necessary for the use, operation or maintenance of the Erie Railway, and a great portion of the property was not the property of the Erie R. Co. or in its possession at the date of the mortgage; that no accounting whatever was had in the foreclosure suit, by which it was or could be ascertained or determined what portion of the assets which came into the hands of the receiver was subject to the

mortgages and what portion thereof was not so subject; and judgment and sale "was had, and said assets were disposed of, as herein above described, without any such determination in said suit; and the New York, Lake Erie & Western R. Co. took over the assets formerly owned by the Erie Co., expressly subject to such examination and determination to be duly and properly made under the direction of the court in the aforesaid suit of the people of the State of New York against the Erie R. Co., or otherwise, and to the results of such examination; and no such accounting or determination has yet been had in that suit or otherwise."

That on or about the 20th of May, 1878, on the petition of the attorney-general an order was made by the supreme court in the people's action, wherein it was ordered among other things as follows: "That James C. Spencer be and he is hereby appointed referee to examine, adjust and pass upon all the accounts, acts, and doings of Hugh J. Jewett, receiver in this action, for and during the entire period of his said receivership, and that for the purpose of such accounting the accounts heretofore rendered by the said Hugh J. Jewett, as receiver in the action of the Farmers' Loan & Trust Co. against the Erie R. Co., and which had been examined and passed upon by the said James C. Spencer, as referee duly appointed in said action, and approved by this court, shall be deemed and taken as accounts rendered and filed in this action, but shall not preclude the attorney-general from making such further examination of said accounts, acts, and doings as he may deem necessary, and such action thereon by the referee and by this court as may be just and proper, nor preclude the attorney-general nor this court from requiring additional or more specific accounts by said receiver, and the said referee shall take testimony for the purpose of ascertaining what property or assets, if any, the said Hugh J. Jewett, as receiver in this action, acquired, held or disposed of, not covered by or subject to the lien of the mortgage of the Erie R. Co. to the Farmers' Loan & Trust Co., which has been foreclosed, and, if any such property has been disposed of by said receiver, what disposition had been made thereof; and also what rights and equities if any, the said Farmers' Loan & Trust Co., the purchasers at the foreclosure sale of the mortgaged premises, or their assigns, had or have in or to such property or assets or any part or portion thereof; and that the said referee report to this court the testimony so taken by him, and the material facts which he shall deem established by such testimony, with his opinion thereon for the further action of this court."

That subsequently to the entry of that order, in the month of March, 1879, the people's action was discontinued as to all parties defendant, except the Erie R. Co. and the Farmers' Loan & Trust Co., without prejudice to proceedings already had; that

supplemental pleadings were served therein, setting up the foreclosure sale, and the conveyance herein above described, including the conveyances to the New York, Lake Erie & Western R. Co., and that the attorney-general under date of the third day of April, 1879, in his reply to the answer theretofore served, of the Farmers' Loan & Trust Co., made the following allegations, among others, to wit: "First alleges and shows that, at the time the receiver heretofore appointed in this action entered upon the performance of his duties as such receiver, he became seized and possessed of all the assets of the said Erie Railway then in possession of said company, including a large amount of stocks and bonds of other corporations, real estate in the City of New York, and elsewhere in the States of New York, New Jersey, and Pennsylvania, and of certain property, choses in action and effects, which were not embraced in the mortgage known as the second consolidated mortgage of the Erie R. Co., nor subject to the lien thereof. And that also during his said receivership the said receiver has lawfully acquired for the benefit of the estate of the Erie R. Co. certain other property, including stocks and bonds of other corporations, which are not affected by said mortgage, nor subject to the lien thereof.

"Second. That said property was improperly, wrongfully, and unlawfully included in the judgment entered in the action to foreclose the said second consolidated mortgage, and in the sale thereunder, and was improperly, wrongfully, and unlawfully included in the deeds to the purchasers at such sale and in the deeds to the New York, Lake Erie & Western R. Co. from said purchasers, and in the mortgage by said New York, Lake Erie & Western R. Co. to the said Farmers' Loan & Trust Co., which deeds and mortgage are referred to in said answer of said Trust Co.

"Third. And the said plaintiffs deny that by reason of any proceedings had in said foreclosure action or by reason of any of said conveyances, or of said mortgages, the said Farmers' Loan & Trust Co. has been, or is now, invested with the title in trust or otherwise, to any of the aforesaid property, stocks, bonds, real estate, and effects, or any part or portion thereof, or has any right or claim thereto."

That hearing upon these objections was had before Spencer, the referee in the people's suit, to which hearing the People of the State of New York, by the attorney-general, the Erie R. Co., and the defendant the Farmers' Loan and Trust Co., were the only parties, and of which hearing no notice was given to unsecured creditors; that such proceedings were thereupon had that on or about the 25th day of November, 1879, a final judgment was entered in the people's suit, in which

a report, theretofore made by the referee was confirmed, and it was adjudged among other things, as follows, to-wit:

"That the receiver in this action did not at any time acquire, hold or dispose of any property of any kind not covered by or subject to the lien of the mortgage of the said defendant the Erie R. Co., to the said defendant the Farmers' Loan and Trust Co., which mortgage has been foreclosed as fully and at large set forth in the said reports of the said referee; that the judgment of foreclosure in the action of the said Farmers' Loan & Trust Co., and the sale under the said judgment, and the conveyance made by the referee in pursuance of such sale, the conveyances and assignments subsequently made to the purchasers at such sale and by such purchasers to the New York, Lake Erie & Western R. Co., did vest in the said . . . company a good and valid title to all the property of every kind and description embraced and described in the said judgment and in the several said conveyances and assignments."

"That the said defendant corporation, the Erie R. Co., be and the same is hereby adjudged to be dissolved."

"That whereas Hugh J. Jewett was heretofore, by an order of this court, duly appointed receiver in this cause, and duly qualified as such receiver, it is further ordered, adjudged, and decreed that said Hugh J. Jewett be and he is hereby continued as receiver of the Erie R. Co., with all the power and authority conferred by law upon receivers of dissolved corporations in like cases."

That the Erie R. Co. was by that decree judicially dissolved; that during all this time the plaintiff and other persons referred to in the complaint similarly situated were unsecured creditors of the Erie Co., holding large obligations against it; that Jewett, as receiver in the People's suit, never advertised any notice of his appointment, or any notice to persons holding "open or subsisting contracts of the Erie R. Co., or other creditors to present their claims to said receiver, nor did he call any general meeting or other meeting of the creditors of such corporation within four months from the time of his appointment, or at any time, for the ascertainment and adjustment of open and subsisting contracts of said corporation, or for any other purpose; and he did not, previous to rendering his account under the foregoing order of reference, or at any time, publish a notice of his intention to present an account, in the State paper, or in a newspaper published in the County of New York, which was the county in which was the principal place of conducting the business of said Erie Co., or in any county, specifying the time or place at which such accounts should be rendered; nor did he in anywise comply with any of the provisions of the statutes of the State in that behalf and hereinbefore recited; but on the contrary thereof, he purposely, and without authority of law, and

with the unlawful intent to prevent the general creditors of said Erie Co., including this plaintiff and those similarly situated, from being heard in said proceedings, abstained from complying and did not comply with any of the provisions of the said statute so as aforesaid recited, and which provisions encroached upon the rights of the said persons and creditors, and were to be strictly pursued; and there was no opportunity or notice given to all concerned in said accounting, or to this plaintiff or those similarly situated, or to anyone holding claims upon open or subsisting engagements of the Erie Co., to be heard by the court in said suit of the people on the accounting of said receiver or otherwise; and the court did not hear the allegations of all concerned in said accounts; and the court did not at any time decree the said accounts to be final or conclusive upon all the creditors of such corporation, or upon the persons who have claims against it upon open or subsisting engagements; and the said court did not have or acquire any jurisdiction in said suit, or otherwise, at any time or in any manner as against such persons or creditors as aforesaid, including this plaintiff, and those similarly situated, to make the said order of reference hereinbefore recited, or any order or decree which should or could deprive such persons and creditors of this plaintiff of their legal rights to the premises or estop or bar them from asserting the same in any court of competent jurisdiction, or from pursuing in such court their legal remedies against the property of said company wherever found, or in whosesoever possession the same might be; and said accounting and decrees, and all the aforesaid proceedings, prior or subsequent, for the determination of the question whether any of the assets received by said Jewett, as receiver, were held by him free from the lien of the mortgages of the Erie Co., and liable to be distributed among the unsecured creditors of the said company, were and are wholly without jurisdiction and void, and are not binding upon or a bar to this plaintiff or those similarly situated with him, he and they having had no opportunity or notice to be heard in the above described actions on the determination of the said question, as by the statutes of this State they had a right to have; and that the same cannot, nor can either or any thereof, without the committing of a fraud in law upon the persons and creditors aforesaid, including this plaintiff and those similarly situated, be interposed as a bar or estoppel, upon their right to pursue the property of the said Erie Co., wherever the same may now be found; and this plaintiff insists, notwithstanding the said proceedings and decrees, that a very large amount of property, consisting of real estate, stocks, and bonds of other corporations and other assets, did come into the hands of said Jewett, as receiver, which were not affected by or subject to the

lien of the aforesaid mortgages, and a portion of which, to an amount not known to this plaintiff, but believed by him to be of the value of many hundreds of thousands of dollars, have been transferred and delivered to said New York, Lake Erie & Western R. Co., which assets, comprising not only the property enumerated in the receipt set forth in this complaint, but also other assets of large value, constitute a fund as herein above described, wherever they may be traced, for distribution among the unsecured creditors of the said company, including this plaintiff and those similarly situated with him."

And the plaintiff prayed judgment that the estate, late of the Erie R. Co., and covered by the mortgages mentioned, be adjudged and "decreed a trust fund, to be applied as the court may direct to the payment and satisfaction of the interest accrued and yet to accrue upon said western extension bonds of the Atlantic & Great Western R. Co. bearing the guaranty of the Erie R. Co., according to the terms thereof, except so far as said interest has been paid by net proceeds of dividends upon the shares of the Cleveland, Columbus, Cincinnati & Indianapolis R. Co.; that any and all orders, decrees, accountings, or proceedings in suits hereinabove described, which may or which can be alleged or claimed to bar or estop the rights of this plaintiff and of other creditors of said company similarly situated with him, to pursue, recover, and enjoy the property of said Erie Co. not embraced in and covered by the mortgages of the Erie Co. hereinabove described, be adjudged and decreed, as to this plaintiff and the said creditors of the Erie Co., fraudulent in law and without jurisdiction on the part of the court purporting to have made the same, and void, and to constitute no bar or estoppel against this plaintiff or said other creditors from pursuing and recovering said property in whosesoever hands the same may be found, and that the said orders, decrees, and proceedings, and each thereof may be, as to this plaintiff and said other creditors, vacated, annulled, and set aside; that the sale of property of the Erie R. Co., now or formerly in the possession of the said Jewett, as such receiver, to-wit: all stocks, bonds, and interests in other corporations, and patent-rights, licenses, and other property, real or personal, not covered by the mortgage to the Farmers' Loan & Trust Co. or subject to the lien thereof, may be declared to be invalid and void, and that such sale may be annulled and set aside; that an accounting be had of such property," and for other relief. All the decrees, legal proceedings, orders and judgments referred to in the complaint are by reference made parts of the complaint.

To this complaint the defendants severally demurred, on the ground that certain parties named were necessary parties defend-

ant to the action, and that the complaint did not state facts sufficient to constitute a cause of action.

Clarence A. Seward and *J. Alfred Davenport* for appellant.

Herbert B. Turner for Farmers' Loan & Trust Co., respondent.

W. W. McFarland and *George F. Comstock*, with *Shipman, Barlow, Larocque & Choate* for other respondents.

EARL, J.—The plaintiff alleges that at the time of the commencement of the actions by the People against the Erie R. Co. for its dissolution, and by the Farmers' Loan & Trust Co. for the foreclosure of the mortgages upon its property, it owned a large amount of stock and bonds in other corporations which were not covered by or subject to the mortgages; and he seeks now to reach that property and to subject it to the payment of certain unsecured obligations which he and other creditors similarly situated then held and still hold against the Erie R. Co. He finds in his pathway the orders and decrees made in the actions mentioned, which must be brushed aside or disregarded before he can succeed.

Facts.

He does not allege in his complaint that any fraud was practised upon the court or any party to the action, and he does not assail those orders and decrees as in fact fraudulent, and seek to have them vacated or annulled on that account. He does not claim that if the court had jurisdiction, as against him and the other general creditors, to make them that he can attack them collaterally or maintain this action. What he claims is that those orders and decrees, so far as they assume to adjudicate upon or dispose of the property in question, were made without any jurisdiction and may therefore be disregarded, and that they furnish no obstacle to the maintenance of this action. Hence, the general inquiry upon which we are to enter is, whether the supreme court had jurisdiction to adjudicate upon and dispose of the property by the orders and decrees made in those actions.

About the 25th day of May, 1875, the people's action was commenced for the dissolution of the Erie R. Co., upon the ground, among other things, that it was insolvent and had been for one whole year; and the complaint in that action, besides other relief, prayed that Hugh J. Jewett, who was then president of the company, might be appointed receiver during the pendency of the action. On the 26th day of May, he was so appointed, with power, as provided in the order appointing him, among other things, to prosecute and defend actions for or against the company, either in the name of the company or in his own name as receiver, and to maintain and preserve the corporate organization and franchises of the company until final judgment in the action.

Thereafter application was made in that action on behalf of the Farmers' Loan & Trust Co. for leave to commence an action against the Erie R. Co. to foreclose the mortgages held by it. Such leave was granted, and on the 14th day of June, 1875, the foreclosure action was commenced in the supreme court. In the prayer for judgment in that action the plaintiff, besides other relief, prayed that an inquiry might be had and account taken of and concerning the premises and property mortgaged to the plaintiff, in order that it might be fully and at large ascertained whereof the mortgaged premises consisted; and that Jewett might be appointed receiver in the action.

On the 15th day of June, by an order duly granted, Jewett was appointed receiver of the mortgaged property in that action; and he was specially authorized to receive and enforce possession of whatever he was bound to receive, to run and operate the railway, to institute, as he might deem needful, whatever suits or proceedings he, by counsel, might be advised to be necessary and proper in the appropriate discharge of his duty as receiver, and to defend and resist any suit or proceedings which he should be so advised and should believe would otherwise be prejudicial to the property, interests or franchies committed to his charge, and generally to do and cause to be done in a lawful manner, as receiver, what might be reasonable and needful in and about the care and preservation of the rights, interests and franchises on which the mortgages were a lien, or the discharge of his duty as receiver might render needful. These orders appointing Jewett receiver, and all the other orders in the two actions were made in the same court, the same judge presiding; and thereafter Jewett must be deemed to have taken and held, as receiver in the foreclosure action, all the property covered by and subject to the mortgages, and as receiver in the people's action all the other property of the company.

On the 6th day of April, 1876, upon affidavit and notice of motion, an order was made by the court in the foreclosure action that the receiver should hold and deal with the stocks and bonds in question in all respects as a part of the general fund of the estate embraced in the mortgages, among other things for the reimbursement to the plaintiff in that action of all sums paid under the orders of the court out of the proceeds of the mortgaged premises for the discharge of debts due from the Erie R. Co., at the date of the receiver's appointment, for labor and supplies, "without prejudice to any equitable rights and interests of the respective parties which may be established on final accounting." And he was also authorized to sell any part of the stocks or bonds at public or private sale, and to use and apply the proceeds for the purposes of the trust.

The foreclosure action proceeded to judgment on the 7th day of November, 1877, which judgment recited that the bonds and stocks lawfully came into the possession of the receiver, and that they were held by him as part and parcel of the property and premises mortgaged to the plaintiff; and it authorized the referee appointed to sell the mortgaged premises, to expose for sale and to sell as part thereof the stocks and bonds mentioned which were described in the decree as a portion of the mortgaged premises; and they were sold by the referee. The sale was afterwards confirmed and the referee was authorized to convey the stocks and bonds with the other property, and he made such conveyance; and the Erie R. Co. executed a similar conveyance of the same property.

Afterward, upon the petition of Jewett in the foreclosure action, an order was made by the court on the third day of May, 1878, by which it was ordered that the receiver deliver to the New York, Lake Erie & Western R. Co., "all the property and franchises whereof he is now possessed, as receiver in this action, and which were embraced or intended to be embraced in the judgment of foreclosure herein, subject to the reservations and exceptions hereinafter specified, and subject to all and singular the rights of the People of this State in and to the premises, or any part thereof, as the same may be ascertained on due inquiry and examination by the attorney-general, in the action of the People of this State against the Erie R. Co. now pending, to the end that such rights and interests may be as fully protected as if this transfer had not been ordered and directed."

In pursuance of that order, and upon the terms thereof, he did make the delivery, and that substantially terminated the proceedings in the foreclosure action. But for the pendency of the People's action, it cannot be doubted that the determination and judgment in the foreclosure action would have been conclusive upon every one. It was within the province of the court to determine what property was actually embraced within or subject in express terms or by subrogation or any other equitable principles, to the mortgages foreclosed.

The unsecured creditors were not necessary or proper parties to that action and had no right to intervene therein, and any adjudication made against the mortgagor was binding upon them. Bronson *v.* La Crosse, etc., R. Co., 2 Black, 524; 67 U. S. bk. 17, L. Ed. 359; Stout *v.* Lye, 103 U. S. 66 bk. 26, L. Ed. 428; Candee *v.* Lord, 2 N. Y. 269.

Unsecured creditors not necessary parties.

Jewett, as receiver in the people's action, was not a necessary party to that action. As temporary receiver he was not vested with the title to the property of the corporation; it was not

divested of its property until final judgment of dissolution and the appointment of the final receiver. The temporary receiver was not a trustee for the creditors of the corporation, but he was a mere care-taker, custodian and manager of its property and franchises, under the direction of the court, during the pendency of the action, having lawful possession of the property; and if a trustee in any sense he was a trustee for the corporation.

Temporary receiver not necessary party.

Nor were the people in any sense a proper party to that action. They had no lien upon or interest in the property. The main purpose of their action was to procure a judgment dissolving the corporation; and any other relief they could obtain was incidental to that. The court could have permitted the people or the receiver in their action to intervene in the foreclosure action, if application had been made for that purpose; but whether it would or not rested in its discretion.

People as party.

The foreclosure judgment absolutely determined that these stocks and bonds were subject to the mortgages, and liable to be sold with the mortgaged premises. They were so sold, absolutely; the sale was confirmed, and the referee was ordered to make the conveyance, including these stocks and bonds to the purchasers; and all this was done without any violation of the rights of the general creditors. The title of the purchasers under the foreclosure sale was in no way made subject to the rights of the people in their action, until an order was made, subsequently to the conveyance by the referee and railway company, to the purchasers for a delivery of the property by the receiver; and in that order it was for the first time provided that the delivery should be subject to all the rights of the people as they might be ascertained by the attorney-general in the people's action; and the delivery was so made.

Mortgaged property—Finality of judgment.

The adjudications made in the foreclosure action absolutely bound all the parties thereto, and none of them could thereafter be heard to say that they were not founded upon sufficient evidence. The supreme court, having general jurisdiction of the parties and the subject-matter, is conclusively presumed to have had sufficient facts before it to authorize the judgment and the orders which were made; and neither the Erie Company nor any of its general creditors can now be heard to say that the judgment was not pronounced after full examination and investigation of all the facts upon which it was based. It imports absolute verity, and it must be presumed that these stocks and bonds were properly subject to the mortgages and were properly sold in connection with and as a part of the mort-

gaged property. Grignon *v.* Astor, 2 How. 319 (43 U. S. bk. 11, L. Ed. 283).

Where a court, having jurisdiction of the subject-matter and the parties, pronounces judgment upon insufficient or illegal evidence, or mistakes the evidence or the law, the only remedy of any person aggrieved by the judgment is by an appeal therefrom, or a motion in the action in which it was rendered; but it cannot be assailed collaterally. Therefore whatever rights the plaintiff has in this action grow out of the commencement and pendency of the people's action against the Erie Company; and such, indeed, is the contention of his learned counsel.

It cannot be claimed that the pendency of the people's action, in which a temporary receiver had been appointed, absolutely prohibited the commencement of the foreclosure action. That action was commenced after leave was regularly obtained by an order of the court made in the people's action. In the action for the dissolution of the corporation, the court was not bound to appoint a temporary receiver. It could have permitted the action to proceed to judgment and then appointed a final receiver, to be vested with the title of the corporate property, and to administer and distribute such property under the direction of the court. The temporary receiver was entirely under the control of the court.

Commencement of proceedings—Discretion of court.

There was no statute regulating or prescribing his duties. He was what was called in the argument a common-law receiver, with such powers and duties as, in the exercise of its equitable jurisdiction, the court might devolve upon him. His duties were in the main to manage, protect, and preserve the property and franchises of the company during the pendency of the action. The people's action could have been discontinued at any time, by the order of the court, and the receivership vacated and set aside, and the property restored to the corporation, and thus fully subjected to the action of the court in the foreclosure action.

The whole matter was constantly under the control of the court until final judgment. Therefore the court had the power to permit the foreclosure action to be commenced, and proceed to appoint a receiver therein, and to supersede the receiver appointed in the people's action, to transfer all the duties of the receiver in that action to the receiver appointed in the foreclosure action, and to order all the property covered by the mortgages to be delivered to such receiver.

The judgment in the foreclosure action appears to have been regularly obtained. There was service of process, upon an appearance by the Erie Co., and an answer admitting the allega-

tions of the complaint. The answer entitled the plaintiff to judgment against it.

But it appears in the record that the attorneys for the Erie Co., more than two years after the commencement of the foreclosure action, consented to the entry of the judgment therein; and this, it is claimed, rendered the judgment absolutely void against the final receiver in the people's action and the creditors of the corporation, under section 71 of 2 R. S. 469, which provides as follows:

"All sales, assignments, transfers, mortgages, and conveyances of any part of the estate, real or personal, including things in action, of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of, or as security for any existing or prior debt, or for any other consideration; and all judgments confessed by such corporation after that time shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation."

That section was aimed, not at the disposition of the corporate property made under the order of the court by its receiver, or even by the corporation, but at the voluntary disposition of its property by the insolvent corporation; and the confession of judgment prohibited was one made by the corporation as its voluntary act without the interference of the court, and not a judgment like this, which rests upon no confession, nor even consent, but upon the action and order of the court at a regular term and session thereof. Such a judgment is in no sense a judgment by confession. If, therefore, it be assumed that section 71 was applicable, it was not violated.

Confession of judgment—Validity.

The people's action was one in equity, under the Revised Statutes (2 R. S. 463, § 38) which provide as follows: "Whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt, or for one year shall have suspended the ordinary and lawful business of such corporation, it shall be deemed to have surrendered the rights, privileges, and franchises granted by an act of incorporation or acquired under the laws of this State, and shall be adjudged to be dissolved."

People's action for dissolution.

That section was unrepealed in 1875, and it is conceded that under it, as originally enacted, an action could be brought in equity for the dissolution of a corporation in the cases mentioned; that in such on action both a temporary and final receiver could be appointed who would be common-law receivers, possessing the powers and charged with the duties devolved

upon them by the orders of the court in the exercise of its equity jurisdiction; that they would not be controlled by the provisions of law which regulate the appointment of receivers in the case of the voluntary dissolution of corporations, under part 3, chapter 8, title 4, article 3, of the Revised Statutes, and that, if the Code which was in force in 1875 did not operate upon receivers appointed in actions commenced under that section, then all of the proceedings in the people's action and the foreclosure action were so far regularly conducted within the jurisdiction of the court that the plaintiff is in no position to assail them. But his contention is that, while the temporary receiver appointed in the people's action was a common-law receiver, whose powers and duties were not regulated by statute, yet that, when Jewett became a final receiver in that action, his powers and duties then became subject, under the Code, to the statutory provisions referred to; and for the present we will proceed upon that assumption.

Upon that assumption, then, what could be done, under the authority and direction of the court, by Jewett as temporary receiver in both actions before judgment and his appointment as final receiver in the people's action? He had such powers and duties as temporary receiver as the court conferred upon him. He could manage, control, and care for the property of the corporation; and, until final judgment in the people's action, the general creditors of the corporation had no right to notice and no absolute right to intervene or to a hearing. The receiver could reduce the property to possession without consulting them; he could manage the railways under the order of the court and incur and discharge debts, sell and buy property in the ordinary business of the company; and he could bring and defend actions, without any notice to or right of interference by the general creditors. If, after his appointment as receiver in the people's action, he had found a large amount of the assets of the company in the possession of adverse claimants, he could have commenced suit therefor either in his own name or that of the company; and if he had failed in the suit, and judgment had gone against him, the adjudications would have bound the creditors of the Erie Co. If he or the Erie Co. had been sued for a debt, a judgment in the suit would have bound the creditors of the company.

Same—Intervention by creditors.

Here, before final judgment, there was a claim, on the one side, by the holders of the mortgages, that these stocks and bonds belonged to it under the mortgages, and that they were, in equity, part of the mortgaged estate. On the other hand, the people claimed that they were not covered by the mortgages, and could not properly be sold under the foreclosure judgment or trans-

Conclusiveness of judgment as to ownership of stocks and bonds.

ferred to the purchasers on the foreclosure sale; and the people claimed that the purchasers under that sale did not get good title. And thus there was a controversy as to this property. That was a controversy which the court had a right to determine before judgment, like any other controversy respecting the property in the hands of its receivers. It appointed a referee to investigate the facts, and to report thereon. An apparently thorough and exhaustive investigation was made, in which the people, through their attorney-general, participated; and, as a result of it, the court determined that these stocks and bonds did come under the mortgages; that they were properly sold with the mortgaged premises; that the purchasers at the foreclosure sale obtained a good title to them; and that they never in fact came to the possession of the receiver appointed in the people's action.

So far no statute was violated and no statutory right of the general creditors was disregarded. They were represented in the litigation by the people and by their debtor; and any judgment rendered or decision made was binding upon them, as it was binding upon the actual parties to the litigation. The court was not bound to defer that litigation until a final receiver was appointed, but has the right to permit it to proceed to a conclusion before final judgment in the people's action. The fact that Jewett was receiver in both actions makes no difference. We may assume, for the purpose of testing the matter, that there was a different receiver in each action, and that they both claimed this property, and that there was thus a controversy to be settled. It cannot be doubted, if such had been the case, that the court would have had jurisdiction to permit one receiver to sue the other for the purpose of settling the controversy, and that a decision made in such a litigation would be binding upon everybody.

It matters not that this controversy and litigation involved all the assets of the corporation which were not plainly covered by the mortgages. The same principles must rule, whether the amount involved was large or small. If the receiver could, under the direction of the court, engage in a litigation over a single steam-engine, or over a debt of $100,000, for or against the corporation, and bind the corporation and its creditors by the result, upon precisely the same principles he could engage in this litigation, to which the people and the corporation were also parties, and bind the corporation and its creditors by the result.

There was no distribution of the assets of the corporation in violation of the rights of the final receiver, or of its general creditors. It was judicially determined that these assets were subject to the mortgages; and that was a determination, as we

have seen, which the court could make without the presence of the general creditors, except as they were represented by the people. The final receiver, when appointed, was vested with all the estate which the corporation had at the time of its dissolution; and these stocks and bonds which had been swept away by the mortgage foreclosure and sale were no part of that estate. The rights which the statutes secure to creditors in the case of the statutory final receiver of an insolvent corporation are such only as pertain to the property which comes to the receiver to be administered by him and distributed to creditors; and there is no statute which entitles them to notice or gives them the right to a hearing before the receiver, except as to claims upon and their rights in such property.

There never was a time when the general creditors of the corporation had any vested right in these stocks and bonds, or to be paid out of them; and the disposition made of them did not impair the obligation of their contracts with the Erie Co. or deprive them of due process of law.

It is claimed, on behalf of the plaintiff, that the title of the final receiver related back to the commencement of the people's action, and that therefore it overrode the disposition made of these stocks and bonds. But the equitable rule which gives a receiver title to the debtor's property by relation, as of the commencement of the action, is one adopted to defeat fraudulent, unwarranted, and unjust dispositions of the debtor's property, and to accomplish just and equitable ends; but it is not applicable to a case where property has been legally disposed of under the direction of the court, and certainly has no application to a case like this, where the property claimed for a final receiver was subject to a lien in favor of mortgaged creditors, and has been sold and disposed of by virtue of that lien during the pendency of the action.

Same—Relation back of title of receiver.

There is a feature of this case which must be here more particularly noticed. After the termination of the foreclosure suit and the sale and the transfer of the mortgaged premises to the new corporation, the New York, Lake Erie & Western R. Co., the latter company executed a new mortgage to the Farmers' Loan & Trust Co., to secure a large amount of its bonds. After the final order of reference, among other things, to ascertain whether these stocks and bonds were covered by or subject to the lien of the mortgages, in March, 1879, the people's action was discontinued as to all parties defendant, except the Erie R. Co. and the Farmers' Loan & Trust Co.; and, by leave of the court obtained in that action, a supplemental complaint was served alleging the foreclosure proceeding, and the sale and

Reference to referee as to title to bonds and stocks.

transfer under the foreclosure judgment, and other matters. To that complaint the Farmers' Loan & Trust Co., in its answer thereto, alleged the foreclosure proceedings, insisting upon the validity of the sale therein made and its title to the stocks and bonds under its mortgage. To this answer the attorney-general, on the third day of April, 1879, served a reply, in which he denied that these stocks and bonds were embraced within the mortgage, and alleged that they were improperly, wrongfully, and unlawfully included in the foreclosed judgment, in the sale thereunder, and in the deeds to the purchasers at such sale, and denied that they or the Farmers' Loan & Trust Co. acquired any title thereto. Thus, an issue was framed by the parties to that action, to be tried and disposed of before the referee appointed for that purpose.

Even if final judgment could have been entered in the action, before the trial and disposition of that issue, how can it be said that the parties and the court could not delay the entry of final judgment until after the trial of that issue? It was an issue framed before judgment, which it was quite proper to try before judgment; and the decision of that issue embodied, in the final judgment upon the report of the referee, that the bonds and stocks were covered by and subject to the mortgages and were legally transferred under the foreclosure sale, bound all the parties to that action and the persons who were represented by them. The people and the railway company represented the general creditors of the railway company; and the Farmers' Loan & Trust Co. represented the bondholders, whose trustee it was. Hence, upon the assumption that the final receiver appointed in the people's action was clothed with the powers and subject to the duties of receivers in the case of the voluntary dissolution of corporations, precisely as claimed by the learned counsel for the plaintiff, yet we reach the conclusion that, during the pendency of that action and of the temporary receivership, the court had jurisdiction to make the orders and decrees complained of, and to authorize the disposition which was made of this property.

Final judgment—Jurisdiction of court to make orders.

But we need not stop here. Even if the reference to, hearing before, and decision by, the referee Spencer had been after final judgment in the people's action, and the appointment of Jewett as final receiver with all the powers of a receiver in the case of the voluntary dissolution of a corporation, still our conclusion would be the same. Prior to the Code of Procedure, final receivers appointed in equitable actions under section 38 were common-law receivers, whose powers and duties were not regulated by

Final receiver—Rights of creditors—Statutes examined.

statute (Mann *v.* Pentz, 3 N. Y. 415); and this is conceded by the learned counsel for the plaintiff.

But he claims that the law was changed by that Code, and that in consequence of the provision thereof the powers and duties of final receivers under section 38 were the same as were devolved upon a final receiver appointed in the case of the voluntary dissolution of a corporation. The Code, as originally reported and enacted in 1848, contained no provisions in reference to the winding up or dissolution of corporations, and section 38 remained unaffected. But in 1849 section 430 of the Code was added, which provided as follows: "An action may be brought by the attorney-general, in the name of the people of this State, on leave granted by the supreme court, or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall,

"1. Offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or,

"2. Violate the provisions of any law, by which such corporation shall have forfeited its charter by abuse of its powers; or,

"3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,

"4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or,

"5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

"And it shall be the duty of the attorney-general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and, upon leave granted, to bring the action in every case of public interest, and also in every other case in which satisfactory security shall be given, to indemnify the people of this State against the costs and expenses to be incurred thereby."

And then by section 444 it was provided that, when judgment should be rendered against a corporation, the court should have the same power to restrain the corporation, to appoint a receiver of its property, and to take an account and make distribution thereof among its creditors as were given in article 3, title 4, chapter 8 of the third part of the Revised Statutes, and that it should be duty of the attorney-general immediately after the rendition of such judgment to institute proceedings for that purpose.

By section 68 of the Revised Statutes referred to, it is provided that such receivers shall have the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made pursuant to the provi-

sions of the 5th chapter of the second part of Revised Statutes.

Section 70 provides that the receivers, immediately on their appointment, shall give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors; and in addition thereto shall require all persons holding any open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers at the time and place in such notice specified, which shall be published for three weeks in the State paper and in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated.

In section 72 it is provided that, after the first publication of the notice of appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the receivers; and all the provisions of law in respect to trustees of insolvent debtors—the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery—shall be applicable to the receivers so appointed, and to the property of such corporation.

Section 73 provides that such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation, by a reference, as is given by law to trustees of insolvent debtors; that the same proceedings for that purpose shall be had, and with like effect; that application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner; and that the referees shall proceed in like manner, and file their report with the like effect in all respects.

Section 74 provides that the receivers shall be subject to all duties and obligations by law imposed upon trustees of insolvent debtors, so far as they may be applicable, except where other provisions shall be made; that they shall call a general meeting of the creditors of such corporation within four months from the time of their appointment, when all accounts and demands for and against such corporation, and all its open and subsisting contracts shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receiver declared.

Section 79 provides how the receivers shall distribute the residue of the moneys in their hands among those who shall

have exhibited their claims as creditors, and whose debts shall have been ascertained.

Section 85 provides that the receivers shall be subject to the control of the court of chancery, and may be compelled to account at any time, and may be removed by the court.

Section 90 provides that any decree or order of the court of chancery, made upon any petition presented pursuant to the provisions of that article, or in the course of any proceedings therein, shall be subject to an appeal.

By looking at the fifth chapter of the second part of the Revised Statutes (2 R. S. p. 41), we find that in section 7 it is provided that the trustees shall have power to sue in their own names, or otherwise, and to recover all the estate, debts, and things in action belonging or due to the debtor, in the same manner and with the like effect as such debtor could or might have done if no attachment had been issued, or trustee appointed, or an assignment had not been made; and, among other things, to settle all matters and accounts between such debtor and his debtors or creditors, and to examine any person touching such matters and accounts, on oath, and to compound with any person indebted to such debtor, and discharge all demands against such person.

Section 8 provided that the trustees, immediately upon their appointment, shall give notice thereof, and therein shall require: (1) all persons indebted to such debtor, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such trustees, and to pay the same; (2) all persons having in their possession any property or effects of such debtor, to deliver the same to the trustees by the day so appointed; (3) all the creditors of such debtors to deliver their respective accounts and demands to the trustees, or one of them, by a day to be therein specified, not not less than forty days from the first publication of the notice.

Section 19 provides that, if any controversy shall arise between the trustees and any other person in the settlement of any demands against such debtor, or of debts due to his estate, the same may be referred to three indifferent persons, who may be agreed upon by the trustees, and the party with whom such controversy shall exist, by a writing to that effect signed by them.

Section 26 provided that the trustees shall, as speedily as possible, convert the estate, real and personal, of such debtor into money; and section 27 provides that the trustees, within fifteen months from the time of their appointment, shall call a general meeting of the creditors of such debtors, by a notice to be published in the same manner as before directed, respecting the publication of the notice of their appointment, in which notice

they shall specify the time and place of such meeting, which time shall not be more than three months nor less than two months after the first publication of such notice; and every such notice shall be published at least once in each week until the time of such meeting.

Section 28 provides that at such meeting, or other adjourned meeting thereafter, all accounts and demands for and against the estate of such debtor shall be fairly adjusted, so far as the same can be ascertained, and the amount of moneys in the hands of the trustees declared; and further sections provide for the distribution of moneys in their hands.

Section 46 provides that such trustees shall be subject to the orders of the supreme court, and of the court of common pleas of the county in which they were appointed, upon the application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them; and they may be removed by the supreme court for cause shown.

From this careful reference to the statutes, upon the assumption that they are applicable, it will be seen that there is nothing in them which requires a final receiver to consult the general creditors of the insolvent corporation in the prosecution or defence of any action. He is required to publish certain notices and to call a meeting of the creditors, that their claims may be adjusted and that the balance of the property in his hands after the adjustment of the claims may be determined. But it is still his duty to take into his possession the insolvent estate, and to use the legal means for that purpose; and he may commence and settle suits, and, under the direction of the court, compromise claims; and he is subject at all times to the order of the court.

In this case there was a controversy as to the ownership of this property, and as to whether it came to Jewett as receiver in the people's action or as receiver in the foreclosure action; and that was a controversy to be settled under the direction of the court. And by a reference, and investigation, and an orderly, legal proceeding, it was determined that the property did not come to him as receiver in the people's action, but that it came to him as receiver in the foreclosure action; and that as receiver in the people's action he had no title or claim thereto, and that the same was properly sold and disposed of in the foreclosure action.

There is no provision of law which required that the general creditors should be made parties to that litigation, or have any notice thereof; and none of their legal rights were violated by carrying the same on without any notice to them. They were represented therein by the people, through the attorney-general

and by the receiver, and by the defendant, the Erie R. Co. They could undoubtedly have been permitted to intervene or to appeal from the judgment or any of the orders, if any ground of appeal existed. But they had no right to attack the same collaterally, unless for fraud sufficient within the rules applicable to such cases to sustain an action to set aside a fraudulent judgment.

These provisions as to notice by the receiver were mostly directory, and were not essential to the jurisdiction of the court. Their omission would constitute an irregularity against which any party aggrieved could have relief by application to the court in the proceeding or in the action. They had reference to the settlement of the claims against the debtor and the distribution of the debtor's property among creditors; but they had no pertinency whatever until the estate should come into the hands of the receiver for distribution by him among those entitled to share therein.

Therefore, standing upon the very ground taken by the plaintiff, assuming the fundamental law to be precisely as he claims, yet we are unable to perceive how it can be said that the court did not have jurisdiction to make the final adjudication which was entered in the final judgment in the people's action. And if we are right in this conclusion, then there is no ground for the maintenance of this action. But the magnitude of the interests involved in this action is such as to justify us in fortifying our conclusions by still further prolonging this discussion; for if the court had no right in the foreclosure action, in consequence of the pendency of the people's action and the temporary receivership therein, to determine whether these stocks and bonds were covered by or subject to the mortgages, then for precisely the same reasons it had no right to determine what property was covered by the mortgages or how much was due thereon; and all the foreclosure proceedings are open to the collateral assaults of this plaintiff and other creditors.

Powers of court of equity —Scire facias —Quo warranto.

We are of opinion that the learned counsel for the defendants are right in their claim that the proceedings in equity under section 38 for the dissolution of a corporation for the reasons therein stated were unaffected by the Code of Procedure. It was provided in section 13 of title 2 of chapter 13, part 3 of the Revised Statutes (2 R. S. 579) that a writ of *scire facias* might be issued out of the supreme court upon the relation of the attorney-general against any corporation created or renewed by any act of the legislature, for the purpose of vacating or annulling such act, on the ground that the same was passed upon some fraudulent suggestion or concealment of a material fact made by the persons incorporated by such act, or made

with their consent or knowledge. That was contained in the article entitled "*Of Scire Facias.*"

Section 27 provided that whenever any judgment should be rendered for the vacating and annulling of any act of incorporation pursuant to the provisions of that article, the court of chancery should have the same powers to restrain the corporation created by such act; to appoint a receiver of its property and effects and to take account and make distribution thereof among its creditors, as were given in the third article of the fourth title of the eighth chapter of that act, relating to the voluntary dissolution of corporations; and that it should be the duty of the attorney-general immediately after the rendering of any judgment vacating and annulling any such act of incorporation, to institute proceedings for that purpose.

Article 2 of the same title is entitled "*Of Information in the Nature of Quo Warranto, and in Certain Other Cases,*" and section 39 provided as follows:

"An information in the nature of a *quo warranto* may also be filed by the attorney-general, upon his own relation, on leave granted, against any corporate body whenever such corporation shall: 1, offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or 2, violate the provisions of any law by which such corporation shall have forfeited its charter by misuser; or 3, whenever it shall have forfeited its privileges and franchises by nonuser; or 4, whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or 5, whenever it shall exercise any franchise or privilege not conferred upon it by law. And it shall be the duty of the attorney-general to file such information, in every instance in which he shall have good reason to believe that the same can be established by proof."

Section 49 provided that whenever it should be found or adjudged that any corporation against which an information in the nature of a *quo warranto* should have been filed, had by any misuser, nonuser or surrender forfeited its corporate rights, privileges and franchises, judgment should be rendered that such corporation be ousted, and altogether excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

And section 51 provided that whenever any such judgment should be rendered, the court of chancery should have the same powers to restrain the corporation created by such act; to appoint a receiver of its property and effects, and to take an account and make distribution thereof among its creditors, as were given in the third article of the fourth title of the eighth chapter of that act; and that it should be the duty

of the attorney-general, immediately after the rendering of any such judgment, to institute proceedings for that purpose.

It is thus seen that there were two systems of procedure which might be carried on against insolvent corporations, or corporations which have done or omitted any act which amounted to a surrender of their corporate rights, privileges or franchises; one was a suit in equity by the attorney-general, of his own motion, without leave of any court, under section 38 above referred to, in which a temporary receiver, and after final judgment, a final receiver, could be appointed, each of whom would possess such powers and duties as might be devolved upon him by the court, uncontrolled by any statutory regulations; the other was a proceeding instituted by writ of *quo warranto* by the attorney-general, after leave obtained of the court, which was a proceeding at law in which the corporation was entitled to a jury trial; and in that proceeding judgment could be rendered dissolving the corporation, but the supreme court had no right to appoint a reviewer. But after final judgment annulling and dissolving the corporation, the attorney-general was required to apply to the court of chancery for the appointment of a final receiver; and his powers and duties were regulated by the provisions contained in article 3, above referred to, in reference to the voluntary dissolution of corporations.

These two systems of procedure against corporations went along, side by side, one in chancery, the other at law. Now what change did the Code of Procedure work? Section 38 was not repealed by that Code, but was expressly saved by section 471 thereof, and remained in force in 1875, when the people's action was commenced. The chapter of the Code which embraced section 430 was entitled "*Actions in Place of Scire Facias, Quo Warranto, and of Information in the Nature of Quo Warranto,*" and the title is quite a clear indication that that chapter was not intended to take the place of article 2, title 4, chapter 8, part 3 of the Revised Statutes which contained section 38, and which was entitled "*Of Proceedings Against Corporations in Equity.*"

Section 428, the first section of the Code and chapter, provides that the writs of *scire facias* and of *quo warranto* are abolished, and that "The remedies heretofore obtainable in those forms may be obtained by civil action under the provisions of this chapter."

And section 429 provided in substance the same as was provided in section 13 of chapter 9 of the Revised Statutes, above mentioned, simply substituting an action in the place of the writ of *scire facias.*

Section 430 of the Code above set out is substantially the same as section 39 of the same chapter of the Revised Statutes,

and was evidently intended to take its place; and section 431 provides that leave to bring the action mentioned in the preceding sections may be granted upon the application of the attorney-general.

Section 432 is a substantial re-enactment of section 28, of chapter 91, and section 442 of the Code is substantially like section 49 of chapter 9; and section 444 is a substitute for sections 27 and 51 of the same chapter.

It is, therefore, we think, quite clear that the chapter of the Code was simply intended to substitute actions in the form prescribed by the Code, in the place of writs of *scire facias* and *quo warranto*, and to regulate the proceedings in such actions. But there was nothing in that chapter which took away from the court of equity the general power which it had always possessed, and which it had previously exercised under section 38, in actions for the dissolution of corporations, for the reasons stated in that section, or which subjected the receivers appointed in such an action to the provisions of section 444 of the Code.

The actions commenced under section 430 of the Code, like those commenced by writ of *quo warranto* under section 39 of the Revised Statutes, for which it was a substitute, continued to be strictly legal actions in which the defendants had the constitutional right of jury trial, and neither a temporary injunction could be granted nor a temporary receiver appointed.

Section 444 made special provision for injunctions and receivers after judgment, and thus forbade them by implication at an earlier stage of the action. The maxim, *Expressio unius, exclusio alterius*, applies.

But this construction of the Code of Procedure is made still clearer by a reference to the present Code. By the repealing act (chapter 245 of the laws of 1880), section 38 of the Revised Statutes was for the first time repealed, and section 1785 of the Code was substituted in its place.

Section 1786 provides that the actions specified in the last section may be maintained by the attorney-general in the name of, and in behalf of the people.

Section 1788 provides for the appointment of a temporary and permanent receiver in such an action; and by that section and the repealing act of 1880, the duties and powers of a permanent receiver so appointed were made the same as those of receivers in the case of the voluntary dissolution of corporations under the Revised Statutes.

The sections to which we have referred, sections 1785, 1786, and 1788, are contained in article 3 of title 2, chapter 15 of the Code; and actions under that article could be commenced without leave of the court. Then, in article 4, provisions are made for the commencement of actions by leave of the court, and those provisions are substantially like those contained in the

Code of Procedure, and which before that Code were contained in that part of the Revised Statutes which related to writs of *scire facias* and *quo warranto* against corporations. When judgment has been rendered in an action provided for in that article, the final receiver is subject to the powers and duties which devolve upon receivers of corporations voluntarily dissolved, and all the actions under that article are triable by jury.

So it appears that the two systems of procedure against corporations which were provided in the Revised Statutes have been continued since the enactment of the Codes. Under the one system the actions may be commenced without leave of the court, and they must be tried as equitable actions; under the other system the actions can be commenced only by leave of the court, and the parties are entitled to jury trial as matter of right. Under the present Code, for the first time under both sytems, by special provisions, a temporary injunction may be issued and a temporary receiver may be appointed during the pendency of an action, and the final receivers are subject to the provisions of the law applicable to receivers in the case of the voluntary dissolution of corporations, whose powers and duties are regulated by law.

Under the Revised Statutes, when equitable and legal remedies were administered in different courts, there was reason for the existence of the two systems. But now, when all the remedies may be administered in the same court, it is difficult to perceive any reason for the continued existence of the two systems; but they do exist, and each must have its proper significance and operation.

We think, therefore, that it is clear that prior to 1880 there was no statute regulating the powers and duties of receivers appointed in the equitable actions commenced under section 38 of the Revised Statutes above referred to.

We have taken no notice of the act, chapter 151 of the laws of 1870, to which our attention has been called, for the reason that that act has no pertinency to any questions involved in this case. It did not extend injunctions and receiverships to new cases. It simply provided that they should be issued and granted in actions, and regulated the practice so as to prevent abuses which had previously been just cause for complaint.

There are other topics brought to our notice in the learned briefs submitted to us. They have not been overlooked; but the necessities of time and space forbid any attention to them here. We have written enough to show that the plaintiff does not, by the facts alleged in his complaint, show a cause of action against the defendants; and that

The judgment should, therefore, be affirmed.

All concur, except FINCH, and PECKHAM, JJ., dissenting.

WILMINGTON AND READING R. CO.

v.

DOWNWARD *et al.*

(Delaware Court of Errors and Appeals, June 21, 1888.)

Dissolution of Corporation—Sale of Property—Dormancy.—By decree of the federal circuit court, the property of the Wilmington & Reading R. Co., so far as situated in the State of Pennsylvania and held under grants by that State, "but exclusive of the franchises granted by the State of Delaware," was sold. Subsequently, the Delaware legislature passed an act to incorporate the purchasers at such sale, which purported to vest the purchasers, among other things, with the privileges and franchises of the corporation, as whose property the same was sold; and all that might have been granted thereto or conferred thereupon by any act or acts of assembly whatever in force at the time of such sale. *Held*, that such act did not operate as a dissolution of the Wilmington & Reading Co., and that therefore debts owing to such corporation, or judgments of record in its favor, were not extinguished; but that the corporation was dormant and incapable of taking any action upon, or assigning such debts and judgment; and hence, that the new corporation could not acquire any right to a judgment entered in favor of the old corporation before the sale, as it did not pass to the new corporation by virtue of the act of assembly; or by virtue of the sale and conveyance.

ON questions reserved from the Superior Court of New Castle County.

Action by the Wilmington & Reading R. Co., use of Wilmington & Northern R. Co., use of John C. Higgins, against James Downward and others composing the firm of James Downward & Sons. The opinion states the facts out of which the questions in issue arose.

Anthony Higgins for plaintiff.

Chas. B. Lore, *Geo. H. Bates*, and *Austin Harrington* for defendants.

SAULSBURY, C.—A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many

Corporations generally.

persons are considered as the same, and may act as the single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyance for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. Chief Justice Marshall's opinion in the case of Dartmouth College *v.* Woodward, 17 U. S. 4 Wheat 626; 4 L. Ed. 656.

A franchise is a certain privilege conferred by grant from the government and vested in individuals. Corporations or bodies politic are the most usual franchises known to our law. Bouvier, Law Dict. 545.

By section 17, article 2 of the constitution of this State it is declared that "no act of incorporation except for the renewal of existing corporations, shall be hereafter enacted without the concurrence of two thirds of each branch of the legislature, and without a reserved power of revocation by the legislature; and no act of incorporation which may be hereafter enacted shall continue in force for a longer period than twenty years without the re-enactment of the legislature, unless it be an incorporation for public improvement."

Constitutional provisions as to incorporations.

The Wilmington & Reading R. Co. was a private corporation for public improvement, and therefore its existence was not limited to the period of twenty years under this provision of the constitution.

Wilmington & Reading R. Co.'s dissolution.

There was no time fixed by positive provision in the charter of the Wilmington & Reading R. Co. when the corporation should cease to exist. Had there been, the corporation, in the absence of a renewal of its charter before that period, would have become dissolved without either a representative or the possibility of one, as no provision is made by our laws for a representative in such a case, and at the instant of its dissolution the debts due to it would have become extinguished, not the right to, or the remedy for, the debts suspended merely, but the debt itself annihilated. Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 14.

A judgment, being No. 181 to the November Term, 1869, was recovered by the Wilmington & Reading R. Co., a corporation then existing under the laws of Delaware and Pennsylvania, against the defendants. A *fi. fa.* was issued, being No. 224 to the November Term, 1870, on this judgment and being made on goods and chattels. Subsequent executions were issued on this judgment, the last being an *alias vend. exp.*, No. 92 to September Term, 1887. On May 29, 1886,

Facts stated.

the judgment was marked for the use of the Wilmington & Northern R. Co. by the direction of the attorney of the plaintiff, and the judgment was afterwards, on June 12, 1886, marked for the use of John C. Higgins, by direction of the president of the Wilmington & Northern R. Co.

The defendants allege that at or about the year 1877, the Wilmington & Reading R. Co. had ceased to have any legal existence as a corporation or any right to perform or do any act whatever, and that the said judgment which had been recovered by it became void and of no effect.

The sixth reason assigned for setting aside the sheriff's sale is that the transfers or assignments alleged to have been made by indorsements on the record and by and through which the said John C. Higgins claims title thereto were illegal, unauthorized, and void and ineffectual to vest in said John C. Higgins any right or title whatever. This reason, so far as it relates to the authority of the attorney directing the judgment to be marked to the use of the Wilmington & Northern R. Co., is not before us, exceptions thereto having, for the sake of expediting the hearing of the questions reserved, been abandoned; so that the real and only question before us is, Was the Wilmington & Reading R. Co. dissolved by the act in relation thereto, passed February 22, 1877, or in other words did the legislature, by passing that act, revoke the charter of the Wilmington & Reading R. Co.

On the 3d of March, 1868, the Wilmington & Reading R. Co. executed a mortgage upon its road, etc., for the payment of money. A suit was afterwards instituted in the United States circuit court for the foreclosure of this mortgage.

The final decree in the case was made April 25, 1876, directing the sale by the trustees of the railroad and property. The sale was made under the decree, November 4, 1876. The deed made by the trustees to the purchasers conveyed "the railroad of the Wilmington & Reading R. Co., extending from a point on the Philadelphia & Reading R. at or near Birdsboro, in the County of Berks, State of Pennsylvania, to the city of Wilmington, in the State of Delaware, with all the rights, privileges, immunities, and franchises of the said Wilmington & Reading R. Co., under any and all grants of the State of Pennsylvania, but exclusive of the franchises granted by the State of Delaware." These franchises granted by the State of Delaware were not included in the mortgage for which foreclosure was decreed; and of course were not included but excluded by the decree of foreclosure. They were not sold by the trustees to the purchasers of said road. Of course, therefore, the purchasers of said Wilmington & Reading R. did not by such sale become entitled to said franchises granted by the

State of Delaware. On the 22d of February, 1877, the legislature of Delaware passed an act to incorporate the purchasers of the Wilmington & Reading R. This act (after reciting in its preamble that the railroad of the Wilmington & Reading R. Co., with its appurtenances, was sold in pursuance of a mortgage executed by said company under authority of laws of this State, and that it was necessary to the proper enjoyment of the rights acquired by said sale that the purchasers should be incorporated, with authority to consolidate with any company organized or to be organized under the laws of the State of Pennsylvania operating such portion of the road so sold as is situated within the State of Pennsylvania), incorporated the persons purchasing the said Wilmington & Reading R. under a decree of the circuit court of the United States for the eastern district of Pennsylvania, a body politic and corporate, by the name of "The Wilmington & Northern R. Co."

By this act the company were vested with all the right, title, interest, property, possession, claim and demand at law or in equity, of, in, and to such railroad, to wit, the railroad of the Wilmington & Reading R. Co., with its appurtenances, and with all the rights, powers, immunities, privileges and franchises of the corporation as whose property the same was sold, and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatsoever in force at time of such sale.

These franchises granted by the State of Delaware, not being included in the mortgage executed by the Wilmington & Reading R. Co., and consequently not sold under the decree of foreclosure thereof made by the circuit court of the United States for the eastern district of Pennsylvania, the purchasers at such sale acquired no title thereto and no property therein. If they acquired any such title or property it could only have been under and by virtue of the act to incorporate the purchasers of the Wilmington & Reading Railroad before referred to. This act purported to vest such purchasers, among other things, with the privileges and franchises of the corporation as whose property the same was sold and which may have been granted thereto or conferred thereupon by an act or acts of assembly whatever in force at the time of such sale.

Corporation dormant but not dissolved.

The condition of a corporation whose charter has expired is not the same as that of a corporation which has failed to elect its officers and as the consequence of that failure is rendered inactive; the life of the one is out of it by its own constitution, and not from a failure to do what its charter enabled them to do to give them active being; the other was entitled by its charter to a continued active life, but it has failed to continue that activity by the election of its necessary officers, its active powers, but not

its being, are gone. The one is dead; the other is dormant. The principles of law which apply to the rights of a corporation thus dormant or disabled are not the same as those which are applicable to the rights of a corporation which is dissolved or civilly dead. In the former case debts due are extinguished; not so in the latter case. No judgment of ouster or other similar judgment or judgment of like effect has ever been judicially declared against the Wilmington & Reading R.

The act to incorporate the purchasers of the Wilmington & Reading R. did not, in express terms, revoke the charter of the Wilmington & Reading R., nor necessarily deprive the latter of its franchises granted by the acts of assembly of the State of Delaware. The Wilmington & Reading R. had never forfeited its charter, as judicially ascertained, by any judgment of a court of law, and even the former act did not so declare. A franchise is property, and it cannot wantonly or of whim be taken away by a legislative act and transferred to another. The act of February 22, 1877, must receive a reasonable interpretation. It must be interpreted to mean that which the legislature of the State of Delaware had a right to do, and not that which the legislature had not a right to do. The rights, powers, immunities, privileges, and franchises conferred by the legislature on the purchasers of the Wilmington & Reading R., must be interpreted such rights, powers, immunities, privileges, and franchises as those conferred by the legislature on the Wilmington & Reading R. by any act or acts of the general assembly which the Delaware legislature had the right to confer, and to vest the same in said purchasers, because the legislature had the right to make such a grant; but the legislature had no authority to take from the Wilmington & Reading R., rights, powers, immunities, privileges, and franchises, the same never having been judicially declared forfeited nor revoked constitutionally by legislative authority. If the legislature had revoked the charter of the Wilmington & Reading R., it could have granted rights, powers, immunities, privileges, and franchises of the same nature and kind as those which the Wilmington & Reading R. had theretofore possessed, but not the same identical rights, powers, immunities, privileges, and franchises, because, the charter being revoked, it would follow that the rights, powers, immunities, privileges, and franchises ceased and determined, and were not the subjects of transferrence to another company by legislative grants. The words "of the corporation as whose property the same was sold and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatsoever in force at the time of such sale," must be interpreted as having relation to what was sold and not

Effect of act to incorporate purchasers of Wilmington & R. R. Co.—Right to judgment.

to that which was not sold and could not have been legally sold under the said decree of foreclosure.

According to this interpretation the words used would have force and effect. A contrary interpretation would render the words of the act of assembly inoperative and void.

It appears from the case stated that the judgment in respect to which controversy exists in this case was, on May 29, 1886, marked for the use of the Wilmington & Northern R. Co. by Victor DuPont, attorney for plaintiff, and on June 12, 1886, for the use of John C. Higgins by direction of H. A. DuPont, president of W. & N. R. Co.

It also appears in like manner that there had been no meeting of the stockholders of the Wilmington & Reading R. Co. after the sale thereof under the decree of foreclosure aforesaid. If these facts be so, the Wilmington & Reading R., as a corporation, was not dead nor the debts due it extinguished so far at least as it existed under the laws of the State of Delaware. In this respect it was only dormant, capable of being revived but incapable of action without such revival. Its life or death rested with the legislature.

The views above expressed in reference to extinct and dormant corporations are in accordance to the opinion of the court in the case of Commercial Bank of Milford *v.* Lockwood, 2 Harr. (Del.) 8.

"There is," says Morawetz on Private Corporations, §§ 1002, 1003, "a broad and fundamental distinction between the dissolution of the corporation and the loss of its franchise or legal right to exist. Much confusion may be avoided by bearing in mind this distinction. Again he says: "If the charter of a corporation limits its existence to a definite period of time, the franchise, or right to exist would expire at the time limited." Again: "The franchise to exist and carry on business as a corporation continues indefinitely, unless the time of its duration is expressly limited in the grant."

If the corporation should be guilty of any wrongful act or neglect of duty which would give the State a right to declare the franchise forfeited, the franchise would nevertheless continue until the forfeiture had been claimed and enforced by the State through the proper legal proceedings.

The commission of a wrongful act or neglect of duty by a corporation would evidently not *per se*, put an end to the actual existence of the corporate association. After a long continued nonuser it may be presumed that a corporation has surrendered its franchise to the State; but the mere fact that a corporation has been without officers or organization, and has performed no corporate acts during a number of years does not put an end to

its franchises, although this may be a good ground for declaring them forfeited by judicial proceedings.

The charter of a corporation does not expire by reason of the omission or commission of acts on the part of the company for declaring a forfeiture; but the franchises continue in full force until the penalty of forfeiture is claimed by the State granting the franchise; and this can be done only through a legal proceeding by which the cause of forfeiture is judicially ascertained, and not in a purely collateral proceeding.

Says Pierce on Railroads, 11: "The nonuse or misuse of its franchises by a corporation, or its breach of the conditions on which its duration is, by the law of its creation, made to depend, is a cause of forfeiture. Such defaults, however, do not of themselves work a forfeiture, but they take effect only when judicially determined in a direct proceeding instituted for the purpose. A nonuser or misuser is a ground of forfeiture, although not expressly declared to be such by statute."

The same writer says: "A cause of forfeiture which has not been judicially declared in a direct proceeding cannot be taken advantage of collaterally."

The legal modes of proceeding against a corporation for usurpation, nonuser, or misuser of a franchise, is *scire facias* or an information in the nature of a *quo warranto*, each prosecuted at the instance—and on behalf of the State.

What becomes of the corporate property of a corporation in the event of its dissolution?

The court in the case of Commercial Bank *v.* Lockwood, before referred to, says that on the dissolution of a corporation, as by the expiration of the period of its charter, its real estate reverts to the grantor; its personal estate to the people, and the debts due to it are extinguished. This is doubtless so at the common law, and in a proceeding at law as a *scire facias* on a judgment; but the more modern doctrine upon this subject seems to be that the capital of a corporation becomes, upon its dissolution, a fund to be administered in equity for the payment of its creditors, and afterwards for distribution among its stockholders. The creditors have a lien on the assets and may follow them into the hands of stockholders and persons who are indebted to the corporation.

The rights of stockholders in the assets are subordinate to those of creditors. See Pierce, Railroads, 13 and authorities cited.

In my opinion, when the constitution of this State speaks of the reserved power of revocation of a corporation by the legislature it means an express revocation by the legislature and not otherwise. It will be seen, from what I have already said, that the judgment set forth in the case stated, being No. 181, to the

November term, 1869, of the superior court, whether it be a valid and subsisting judgment or not, did not pass to the Wilmington & Northern R. Co., by virtue of the acts of assembly, mortgage foreclosure proceeding, sale and conveyances recited in the case stated so as to give the said Wilmington & Northern R. Co. the right to enforce said judgment by executions issued against the defendants; and that John C. Higgins, who claims to be assignee of said company to said judgment, has not the right to enforce said judgment against the defendants.

GULF, COLORADO AND SANTA FE R. CO.

v.

MORRISS *et al.*

(*Texas Supreme Court*, 1887.)

Franchise—Transfer of Property—Defeating Corporate Ends.—A railroad corporation being organized for a public purpose cannot by contract of sale, lease, or otherwise, so dispose of its track and corporate property as to incapacitate itself from fulfilling its duties to the public, except express power has been conferred upon it by the State, either in its charter or by statute.

Same—Statutory Authority—Texas Railroad—Incorporation Law.—By the general railroad incorporation law of Texas there is no authority conferred upon railroad companies to sell their tracks, nor is there any power conferred to purchase the track of another company.

Same—Branch Road—Authority to Contract—Purchase.—A statute authorizing a railroad company to locate, construct, and operate a branch line, does not confer upon it any power to purchase a line already constructed, although it may be so located, and run in such a direction that if constructed by the purchasing company it would have been deemed a branch line.

Dissolution of Corporation—Sale of Road by Stockholders—Liability for Debts.—A number of stockholders of the Gulf, Colorado & Santa Fé R., through one of their number and in his name, purchased all the stock and outstanding bonds of the Central & Montgomery R., and destroyed the latter, intending to sell that road to the Gulf, Colorado & Santa Fé R. Co. The stockholders, however, never bought the Central & Montgomery R., except as they might have acquired an interest in it by the purchase of the shares of stock and bonds. The stockholder in whose name the purchased stock stood, for the benefit of himself and those interested with him made a proposition to the Gulf, Colorado & Santa Fé R. Co. to sell the Central & Montgomery road, which was accepted. *Held*, that the purchase and destruction of the stock and bonds, and subsequent sale by the stockholders of the Gulf, Colorado & Santa Fé R. Co., did not operate as a dissolution of the Central & Montgomery R. Co. so as to relieve it, as a

corporation, from its debts and obligations; and that its road and franchise were still subject to sale under execution, issued on a judgment in favor of the creditors of the Central & Montgomery R. Co.

APPEAL from District Court, Montgomery County.

Action by the Gulf, Colorado & Santa Fé R. Co. against Morriss and Crooker to enjoin the sale of the Central & Montgomery R. under a judgment, execution, and levy in favor of the defendants. The plaintiff appeals from a judgment dissolving a temporary injunction, and giving ten per cent as damages for delay.

Ballinger, Mott & Terry for appellant.

Hutcheson & Carrington, and *J. E. & W. P. McComb* for appellees.

STAYTON, J.—On April 14, 1882, the charter of the appellant was amended under the general law, and by that it was provided, in addition to powers otherwise given, that it should have power "also to construct, own, operate, equip, and maintain a branch of said railway to be called the 'Eastern Branch' thereof, commencing at a point on its main line in Burleson county, about two miles north of the Yegua; thence easterly, through the counties of Burleson, Brazos, Grimes, and Montgomery, to a point on the International & Great Northern R., within three miles of the Lemuel Smith 1280-acre survey in Montgomery county, with the right to purchase the Central & Montgomery R., and to own, operate, equip, and maintain the same, under this charter, as a part of said Eastern Branch." The Central & Montgomery R. Co. then owned and was operating a railroad from the town of Montgomery, in Montgomery county, to Navasota, in Grimes county, about 28 miles in length, and running near to and nearly parallel with the proposed eastern extension of the appellant's road, and making connection with the Houston & Texas Central R. at Navasota. A number of the stockholders of the Gulf, Colorado & Santa Fé R., through one of their number and in his name, purchased all the stock and outstanding bonds of the Central & Montgomery R., and destroyed the latter, intending to sell that road to the appellant. The stockholders, however, never bought the Central & Montgomery road, except as they might have acquired an interest in that road by the purchase of the shares of stock and bonds it had issued. The matter thus standing, the stockholder in whose name all the purchased stock stood, for the benefit of himself and those interested with him, made to the executive committee of the appellant the following proposition: Facts.

"GALVESTON, TEXAS, June 12, 1882,

"*H. Rosenberg, Esq., Chairman Executive Committee G., C. & S. Fé R. Co.*—DEAR SIR: On the fifteenth day of June, 1881, your board of directors authorized a subscription of fifteen hundred dollars in stock, and three millions of bonds of your company at par, for the purpose of the further extension of your road. The subscription was taken by the stockholders of record on the first day of June, 1881; thereby giving to them the right of all stock and bonds to be issued by your company until said subscription is cancelled. Ascertaining that your company had determined to extend a branch road into eastern Texas for the purpose of reaching the timber country, and believing it to be advisable to prevent the completion of a competing line of road already in existence by purchasing the same, I was authorized by the subscribers to your stock and bonds to make the purchase of the Central & Montgomery road, extending from Navasota to Montgomery, a distance of about twenty-eight miles, and I now offer the same to your company, including all its equipments, free from all debts, stock, bonds, and otherwise, for the following proposition:

"204 bonds of your company at par . .	$204,000.00
With coupons attached to July 1st . .	7,140.00
Stock of your company	238,500.00
And cash	29,455.22
	$479,095.22

"Asking your immediate action upon this proposition, I remain, Very truly, GEO. SEALY,
"For the Subscribers to the 1,500,000 Stock, 3,000,000 Bonds."

And on the same day the proposition was accepted in writing by H. Rosenberg, on behalf of the executive committee, as follows:

"In accordance with the resolution by the board of directors, May 8, 1882, directing me to purchase the Central and Montgomery road at a cost not exceeding twelve thousand dollars in bonds and eight thousand dollars in stock of this company per mile, and this proposition being within that limit, we hereby accept the proposition of George Sealey, and recommend the board of directors to approve of our action.

"For the Executive Committee, H. ROSENBERG, Chairman."

This action was reported to the board of directors at a regular meeting held by them on the same day, and was approved and adopted by the board as its act; and all this was approvrd by the stockholders at a regular annual meeting held by them on October 3, 1882. The Gulf, Colorado & Santa Fé R. Co. took possession of the Central & Montgomery R. on June 15,

1882, and from that time continuously ran, operated, repaired, and maintained it at its own expense, as a part of its line under its amended charter, and thereafter the Central & Montgomery R. Co. ceased to exercise control over the road, or to keep up its corporate organization, but its president made a report to the comptroller, as required by law, showing the condition of the company to the date last mentioned. No further facts tending to show that the Gulf, Colorado & Santa Fé R. Co. acquired title to the Central & Montgomery R. are shown, or claimed to have existed, except that the price named in the proposition to sell, before mentioned, was fully paid.

Morris & Crawford subsequently obtained a judgment against the Central & Montgomery R. Co., in district court for Montgomery county, which was affirmed on writ of error at the present term, 3 S. W. Rep. 457. The cause of action on which that judgment was obtained, accrued, in part, prior to June 12, 1882, and all grew out of the failure of the Central & Montgomery R. properly to transport freight. An execution, the first and only one, issued on the judgment in favor of Morris & Crawford on March 27, 1884, directed to the sheriff of Grimes county, which was levied on the road-bed, iron track, ties, switches, and right of way of the Central & Montgomery R.

This action was bronght by the Gulf, Colorado & Santa Fé R. Co. to enjoin the sale of the Central & Montgomery R. under the judgment, execution, and levy in favor of Morris & Crawford. A writ of injunction was issued, but on final hearing it was dissolved, and a judgment giving 10 per cent damages for delay was rendered against the plaintiff company.

The injunction was sought, and is now claimed, on the theory that the facts we have stated passed title, at least equitable, in the Central & Montgomery R. to the Gulf, Colorado & Santa Fé R. Co., and that it thereby became not liable to sale for the debt due Morris & Crawford. It is not claimed that the Gulf, Colorado & Santa Fé R. Co. purchased the stock of the Central & Montgomery R., nor could it well be so insisted under the facts. It is denied that the transaction operated a consolidation of the two railroads, and that they thereby became one under the charter of the Gulf, Colorado & Santa Fé R. Co. It is also denied that the one was in any way merged in the other, and in all these propositions we concur with counsel for the appellant.

It is claimed, however, that the Central & Montgomery Railroad corporation was dissolved by the facts stated, and that the property which it owned before dissolution became the property of the appellant company. It is well settled that corporations organized for public purposes cannot, by contract of sale, lease, or otherwise, render

Sale or transfer of public corporation.

themselves incapable of performing their duties to the public, or in any way absolve themselves from the obligation which forms the main consideration for giving them a corporate existence, unless this be done by consent of the State, given through the charter, or in some other manner. Hence any contract through which such a corporation seeks to accomplish such a result is void, unless it has legislative sanction. Thomas *v* Railroad Co., 101 U. S. 71; Pierce, R. R. 10; Tayl. Corp. 305, 131, 132; Mor. Corp. 485, 490. Authorities bearing on the various phases of this question are cited in notes given by the elementary writers here mentioned. The stockholders of a strictly private corporation, acting in the mode prescribed by law for the transaction of its business may dispose of its assets, and thereby become unable to carry on further the corporate business; for the public has no interest in the continuance of such a business.

Do the facts show that the Gulf, Colorado & Sante Fé R. Co. has become the owner of the property of the Central & Montgomery R. Co., which it may operate under the charter of the latter, and hold freed from the debts of that company?

The first question arising on this inquiry is, had the Gulf, Colorado & Santa Fé R. Co. any power to buy the property of the Central & Montgomery? This will depend upon whether the charter of the former gave it power to buy, or the charter of the latter gave it power to sell to the former. Both corporations were chartered under the general law regulating the incorporation of such companies, in so far as any question involved is concerned. Whatever powers that law authorizes to be conferred upon them through their charters, those they had, and they had no more and no less; this, of course, carrying such incidental powers, not enumerated, as were necessary to enable them to exercise properly the powers expressly granted. No part of the general law authorizes one railroad company to buy the railroad of another, nor does it authorize a railroad company to sell its road to another company or to any person. The law authorizes railroad companies to loan money to construct, complete, improve, or operate their roads, and to give mortgages therefor. Rev. Stat. art. 4219. These mortgages may be foreclosed through the courts, or sales may be made under powers contained in such mortgages; and title to the property will pass. They may become indebted in the course of their business, and their property, including franchise, subjected to sale under judicial process to pay such indebtedness. But in such cases the corporation continues, and the purchasers become, in effect, mere stockholders; the corporation property so purchased, however, being relieved from liability for debts not creating a prior

Power to buy property—Statutory authority.

encumbrance on the property sold. These are the means through which the laws of this State authorize the sale of railroads. They do not contemplate that one railway company shall have the power voluntarily to buy from or sell to another. The purpose for which the incorporation of railroad companies is permitted, under the general incorporation act, determines largely the powers they may exercise. That act provides that "any number of persons, not less than ten, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning, maintaining, and operating such railroad by complying with the requirements of this chapter." Rev. Stat. 4099. They are authorized to incorporate for one purpose—to construct, to own, to maintain, and to operate such railroad, i.e., to own, maintain, and operate the road the company may construct under its charter. Incorporation is not authorized for several and distinct purposes; as, to construct a road for some other corporation, to maintain a road owned by some other corporation, to operate a road owned by some other corporation, nor to become the owner, by purchase, of a railroad constructed and owned by some other corporation.

This is the only legitimate construction that can be placed on the language used in the statute. If, however, there could be doubt as to this, the matter is made too clear by subsequent provisions of the law. The law requires articles of incorporation to be adopted, signed, and filed in the office of the secretary of state, and these are required to give information on specified subjects, and, among others, to state the identical thing the contemplated corporation purposes to do. They must state "the places from and to which it is intended to construct the proposed railroad, and the intermediate counties through which it is proposed to construct the same." Rev. Stat. art. 4101. "When the articles of incorporation have been filed and recorded as herein provided, the persons named as corporators therein shall thereupon become and be deemed a body corporate, and be authorized to proceed to carry into effect the objects set forth in such articles, in accordance with the provisions of this title." Rev. Stat. art. 4105. Thus is the power which such corporations may have, when incorporated under the general law, declared.

It may be urged, however, that, if the power of the one corporation to buy the road of the other was not given under the original charters of either corporation, yet that such a power was acquired through the amendment to the charter of the Gulf, Colorado & Santa Fe R. Co., which provided, in effect, that it should have the "right to purchase the Central & Montgomery Railroad, and to own, operate, equip, and maintain the same, under this charter, as

Branch road—Power to contract.

a part of said Eastern Branch." The law providing for the amendment of railroad charters nowhere intimates that such a corporation may acquire rights or powers through an amendment which it could not have acquired under its original incorporation. One of the leading purposes intended to be subserved through an amendment to a railroad charter, under the general law, was to enable them to change or extend the line of road to be constructed, and not to enable them to acquire powers of a character different to those they might acquire through the original act of incorporation. This is illustrated by article 4113, Rev. Stat., which is the only part of the law regulating amendments other than such as put restrictions on the right to amend, that indicates the character of amendments that may be made. It provides that "any railroad corporation may, by amendment to its charter, project and provide for the locating, constructing, owning, maintaining, and operating a branch line to its original trunk line of railroad from any point on said original, main, or trunk line to any other point in this State, by a braneh line to the main line, making an angle with said main line of at least twenty-five degrees in the general course of said branch line, and also so projected that said branch line shall in no case be so located as to be or become such a line of railroad as that, if the same were owned by another corporation, the corporation owning the main line, or any one of the other branches thereof, would be forbidden by the constitution and laws, from consolidating therewith on account of the lines being parallel or competing lines." The succeeding article provides how much of a line authorized to be built by an amendment shall be completed and put in running order within given periods.

No one can acquire a power or right under a law which the law itself does not provide he may have by a compliance with it. The articles for incorporation, under the general law, are required to be passed upon by the attorney-general before they can be filed and incorporation be accomplished, but the law does not confide to the attorney-general or to the incorporators the power to determine for what purposes incorporation may be had or what powers the corporation may acquire by the act of incorporation. That is determined by the law which permits the incorporation. The rule that a corporation has power to do only such acts as its charter, considered in relation to the general law, authorizes it to do applies to every class of corporations. The powers need not all be express, for such will be implied as are necessary to enable the corporation to carry out the powers expressed or necessary to accomplish the general purposes for which the corporation is created. Power to buy a railroad cannot be implied from an express grant of power to construct, own, maintain,

Power to buy a road not implied from express grants.

and operate a railroad to be constructed by the corporation to which these express powers are given, for they are not reasonably necessary to the accomplishment of the purposes contemplated. The one corporation having no power to purchase the railroad of the other, it must be held that the appellant company acquired no title to the property levied on, and it therefore becomes unnecessary to consider any equities that may grow out of the transaction between the parties to it.

The Central & Montgomery R. Co. is an existing corporation, so far as appears from the record before us, and such person or persons as may hold its stock have it within their power to complete a reorganization. As held at the present term, in the case of Central & M. R. Co. *v.* Morris, 28 Am. & Eng. R. R. Cas. 50, that company and its property are liable for any matter of indebtedness incurred in the management of whomsoever the railroad may have been. The issuance of an execution first to a county other than that in which the judgment was rendered was an irregularity, but of this no one not having an interest in the property levied upon can take advantage. The injunction was therefore properly dissolved.

The statute permits the assessment of ten per cent damages, on the dissolution of an injunction when it appears that the injunction was obtained for delay only. We are of the opinion that the facts of this case, considering the nature of the questions involved, do not show that such was the purpose for which the injunction was obtained. The judgment will therefore be reversed and so re-formed as to dissolve the injunction without giving damages. It is so ordered.

As Power to Sell Railway Property and Franchises.—New York, etc., R. Co., New York, etc., R. Co., 25 Am. & Eng. R. R. Cas. 215.

Device to Avoid Liability—Surrender of Road to Trustees.—In Acker *v.* Alexandria & F. R. Co. (Va.), 6 S. E. Rep. 688, the Virginia supreme court of appeals, following the case of Naglee *v.* Alexandria & F. R. Co., 32 Am. & Eng. R. R. Cas. 401, hold that a railroad company chartered under the laws of Virginia cannot, by the voluntary surrender of the possession, control, and operation of its road, by deed of trust to trustees of its own selection, shift the responsibilities imposed upon it by law; nor relieve itself from liability for wrongs or injuries subsequently done to persons or to property in the negligent operation of its road.

DAY *et al.*

v.

OGDENSBURG AND LAKE CHAMPLAIN R. CO. *et al.*

(107 *N. Y.* 129.)

Dissolution—Operation of Statute—Action of Court.—A statute incorporating a railroad company which provides that if the company fail to construct and finish its road within the time prescribed by the charter "said corporation shall be dissolved" is not self operating in the event of a failure to complete the road within the time limited, and the corporate existence does not terminate without judicial proceedings and judgment.

Lease of Road—Statutory Authority.—Under the New York statute of 1839, which authorizes a railroad company to agree "with any other corporation" for the use of its road "in any manner not inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract," a railroad corporation organized under the laws of the State of New York is empowered to lease the road of a corporation organized and constructed in the State of Vermont, provided such latter corporation is by charter authorized to lease its road.

Same—Duty of Bond-holders—Absorption of Earnings.—By the terms of what were known as "income mortgage bonds" of a railroad, the interest payable was subject to the condition that the entire earnings of the railroad, after deducting the operating expenses and interest on liens and indebtedness, should suffice to pay the interest upon the bonds. The coupons upon the bonds contained the same condition. The property mortgaged included not only the railroad and its branches with the franchise, but all property and privileges then owned by the company, or which might thereafter be owned or acquired by it; and the mortgage stipulated that another mortgage or assurance should be given upon after acquired property, if requested. *Held*, that by the terms of a mortgage and bonds the parties contemplated that the directors should have power to manage and extend the road in the usual manner and were not precluded from exercising the power possessed by them, of leasing the road to another company upon terms which rendered the lessee responsible for mortgages by the lessor (such responsibility being by way of rent), and that the fact that the lease would reduce the amount available for the payment of the coupons of the "income mortgage bonds" did not constitute any breach of contract between the bond-holders and the mortgagor.

APPEAL from General Term of the Supreme Court, Third Department.

Action against the Ogdensburg & Lake Champlain R. Co., to restrain the defendant from using its income to pay bonds issued by and the expenses of operating the Lamoille Valley Extension R. Co., to the prejudice of the holders of

coupons for interest on the "income mortgage bonds" of the defendant company. The opinion states the case.

D. O'Brien, Atty.-Gen., *Louis Hasbrouck* and *D. G. Griffin* for appellant.

Edward C. James and *A. R. Herriman* for respondents.

DANFORTH, J.—The plaintiffs object—First, that certain acts of the defendant, the Ogdensburg & Lake Champlain R. Co., done and threatened, are in excess of its powers and illegal; second, that, if otherwise valid, the defendant has so bound itself by contract that the appropriation of its earnings to carry out those acts is a breach of that contract. So far they have succeeded. Interlocutory judgment was given in their favor, at special term, and affirmed at general term. The questions submitted to the court were raised by demurrer to the complaint, and this appeal involves an inquiry as to whether the allegations of that pleading are sufficient to constitute a cause of action. Case stated.

The defendant, appellant here, is a railroad corporation organized and incorporated under and in pursuance of the laws of the State of New York. As such it owned and operated a line of railroad from Ogdensburg to Rouse's Point, in this State, and in the year 1880 was authorized, by a special act of the legislature (Laws 1880, *c.* 73), to issue bonds in such form, and payable at such time, as its directors might determine, and secure the whole or any part of said bonds by a mortgage upon its franchise, railroad, and other property, both real and personal. Prior to this time, in October 1872, the legislature of the State of Vermont created a railroad corporation under the name of the Lamoille Valley Extension R. Co., to build a railroad from some point in the towns of Swanton and Alburgh to the north line of this State in the town of Alburgh, with the right to build and maintain a bridge, with a suitable and convenient draw, for the passage of vessels, from some convenient point at or near the eastern shore of the Missisquoi bay in the town of Swanton, to some point at or near the western shore of Missisquoi bay in the town of Alburgh, a distance of about 12 miles. The act also provides that its directors may at any time make such alterations in the route or location of said road as they may deem necessary or expedient, and also that the corporation "may contract with the managers of any railroad company to perform all transportation of persons and property upon and over said road, and may lease their said road, and do such other things as may be necessary to build and run said road," but declares that "if said corporation shall not, within ten years from the approval of this act, commence the construction of said railroad, then said corporation shall be dissolved." Facts.

Ten years and more elapsed after the charter was approved, and the construction of the road had not been commenced; but on the second of February, 1882, the Lamoille Valley Extension Co. entered into an agreement with Vanderbilt and Phelps, and the defendant, the Ogdensburg & Lake Champlain R. Co., by which, after reciting that, with a view to establish all rail routes for traffic and passengers between the west and northern New England, and to form necessary connections to carry the same into effect, a new railroad must be constructed from Rouse's Point to Maquam bay or Swanton, in the State of Vermont. And the railroad companies above named deem it for their interests to have such railroad constructed, and such connections made. The Lamoille Valley Extension Co. agreed to issue so many first mortgage bonds, not exceeding $350,000, as should be sufficient to construct the road and bridges. Vanderbilt and Phelps agreed to purchase them for that purpose, and the Ogdensburg & Lake Champlain R. Co. agreed that, when the road should be completed, they would take a lease of it in perpetuity in the form and on the conditions then agreed upon. Subsequently the road was built, and on the thirty-first of December, 1883, an agreement was made between the Lamoille Valley Extension Co. of the first part, and the Ogdensburg & Lake Champlain R. Co. of the second part, by which the former leased to the other its railroad, "together with all the lands on which said railroad is constructed, including all the lands acquired, held, and owned by the parties of the first part for roadway, station, and all other purposes of their incorporation, and all the rights, easements, franchises, and privileges, in connection therewith, or which are appurtenant thereto, and all the superstructure of said railroad, of whatever name or nature, and all the buildings, bridges, wharves, docks, and piers and structures of whatever name or nature, pertaining to said railroad, and the land and premises on which the same are standing; and all the rights, privileges, and franchise, of the said parties of the first part, now possessed by them, including their right to construct, maintain, and operate said railroad; and all the rights, privileges, and franchises which the said parties of the first part may hereafter lawfully have, obtain, and exercise,—to have and to hold the same from the date thereof in perpetuity."

The defendant the Ogdensburg & Lake Champlain R. Co. on its part agreed to equip, maintain, and operate the demised railroad as a part of their line, and to keep it, "its bridges," etc., in good order; to pay taxes assessed upon it, and certain other expenses; to pay also the interest and principal at maturity of the bonds issued to Vanderbilt and Phelps under the agreement of February 2, 1883; and, further, that the whole of the annual gross earnings of the demised railroad shall be annually applied

and used—First, to the payment of the interest upon said bonds as the same becomes payable: and, second, to the creation and payment into a sinking fund, for the gradual redemption and payment of the principal of said bonds, of which sinking fund the Ogdensburg & Lake Champlain R. Co. were made the trustees, and an amount of said bonds equal to one fiftieth part of the whole amount thereof shall annually be cancelled; it being understood, however, that, whether said gross earnings are adequate to these purposes or not, the parties of the second part are to pay semi-annually the interest on said bonds as the same becomes due, and annually obtain and cancel one fiftieth part of the whole amount of said bonds.

Dissolution—Statute providing for not self executing.

The learned counsel for the respondents contends that, by reason of the omission of the Lamoille Valley Extension Co. to commence the construction of its road within the time prescribed by the charter, its existence ended, and left it without power to do a corporate act. The language of the act is that, in such event, "said corporation shall be dissolved." In this State it is well settled that, under a similar statute, dissolution is not affected by a mere failure to perform the condition, nor without judicial proceeding and judgment. The cases cited for the appellant (*In re* Railroad Co., 72 N. Y. 245, and 75 N. Y. 335; Brooklyn S. T. Co. *v.* Brooklyn, 78 N. Y. 525) are easily distinguishable from the case at bar. The statute before the court in those cases provided, in express terms, that if the railroad company in question failed to furnish its road within a time specified, "its corporate existence and power shall cease." It was held that the statute executed itself, and that non-compliance with the condition extinguished the corporation in question by virtue of an express limitation upon the original grant of corporate power. But the general principle was recognized that, in the absence of such or like language, a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not *ipso facto* lose its corporate character. It does not appear that any different effect is given to such a statute by the courts of Vermont, but, on the contrary, in Railroad Co. *v.* Railroad Co., 34 Vt. 2, the supreme court of that State say it is beyond question that, unless the legislature undertake to declare a forfeiture upon facts that have already occurred, it appertains to the judicial department of the government to determine whether such forfeiture has been incurred. So far, therefore, the courts agree.

It is next argued for the respondent that the arrangement expressed through these instruments, so far as the Ogdensburg & Lake Champlain R. Co. is concerned, is beyond the capacity and power of that corporation. We have seen that the Vermont

R. Co. had corporate powers, and among those expressly given by its charter is a power to lease its road. It had therefore contracting capacity, and was a good party to deal with. The Ogdensburg & Lake Champlain R. on its part lacked no power expressly given by statute to similar corporations in this State, nor any which as incident and necessary thereto might enable it to carry on the objects of its incorporation. Among other statutes to which it might appeal was one "authorizing railroad companies to contract with each other." Laws 1839, c. 218. Under this act it might lawfully agree "with any other railroad corporation" for the use of its road "in any manner not inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract." The contract in question is not affected by the limitation expressed in the act, and unless we are to imply into it another restriction, and say that its operation must be confined to contracts with roads operating in and under the laws of this State, the lease must be held valid between the parties. We see no reason for such restriction, nor any principle of public law which requires it. We are not at liberty to create it. It would be legislation, not construction. A corporation given capacity to contract may exercise that capacity with any party in or outside the limits of the State, unless the law-making power of that other State forbids. Bank of Augusta *v.* Earle, 13 Pet. 519. Our own statutes, and the interpretation given to them by the courts, are to that effect. Woodruff *v.* Railway Co., 93 N. Y. 609: *In re* Railway Co., 99 N. Y. 12; *In re* Townsend, 39 N. Y. 171; *In re* Rapid Transit Co. 103 N. Y. 251.

Lease of road—Statutory authority.

In this case there is no such prohibition. Nor do we find that the defendant has hired, or that the lease covers, an incomplete road. It was, indeed, finished in performance of an agreement entered into at the same time the lease was bargained for; but the parties intended only a completed road, and before the lease was executed the road was completed. It was thought to be a wise exercise of the power conferred upon its directors in the management of its affairs. Its object to secure a continuous road with connections necessary to extend its business, and so accommodate freighters and passengers and at the same time add to its receipts, is opposed to no principle of public policy. There is no suggestion that it was fraudulently made, nor but that the terms are reasonable, agreed upon in good faith, and in the honest belief that the interests of the corporation would by it be promoted. We think the agreement was not beyond the power of the corporations to make; that the lessor was able and not restrained to make the lease: that the lessee was capable and not disabled to receive

the thing demised; and therefore, as between the parties, that the lease was valid. The payment of interest upon the bonds issued by the Lamoille company, and the annual payment of a portion of the principal of those bonds, was by way of rent merely for the use of the road, and the privileges procured through the lease. If the lease was valid, whether the lessor paid the rent in money, or its own bonds or promises, or by discharging an obligation of the lessee, could make no difference. In either way it obtained credit in connection with its business. There was a choice of means to effect a lawful purpose, and it was within the discretion of the contracting parties to adopt one rather than the other as a part of the transaction.

We are next to consider the relation of the parties, and their respective rights, as defined by contract. So far as presented in this action, they depend upon the true construction of the terms of the income bonds above referred to, and part of which are held and owned by the plaintiffs. Their claim is that the defendant has no other source "or property than its own earnings" to meet the obligations incurred to the Lamoille company; that these earnings are insufficient to meet the accruing interest upon the income bonds, and, if diverted to the discharge of the new indebtedness, will be absorbed thereby; and so they allege that, in carrying out the terms of the lease, and paying the rent reserved, the defendant is diverting money or revenue to which they are entitled under the bonds. The plaintiffs' case is put and must stand, if at all, upon the terms of the bond, and upon nothing else. What those are will not appear. The complaint shows that, in pursuance of the act of 1880, *supra*, the company executed its mortgage to trustees, reciting therein its determination to issue two classes of bonds, one to be known as "the first consolidated mortgage bonds," not to exceed in amount $3,500,000, and the other as "income mortgage bonds," not to exceed in amount $1,000,000, all payable in 40 years from the first of April, 1880, with interest on the first-class half yearly, and on the second or income bonds annually, payment of both principal and interest of the first class, but only the principal of the second class, to be secured by mortgage. The promise to pay interest upon the latter class is subject to the condition that "the net earnings of the railroad and other property of the company for each period, after satisfying the expenses of operating and maintaining the same, with all taxes, assessments, and floating indebtedness, and the interest on all liens, charges, incumbrances, and other indebtedness (but not meaning thereby any dividends on the preferred stock of said company), on the property of or owned by said company, shall respectively suffice to pay such rate of interest

Relation of parties—Duty of bondholders—Absorption of earnings.

on all of this issue of bonds then outstanding at the specified dates following each of said periods, or such interest less than six per centum per annum as such net earnings during such periods shall be sufficient to pay upon all said bonds then outstanding, each of the same being entitled to a ratable share thereof; and provided that the interest warrant or coupon of that date, and also all such warrants or coupons which shall have previously matured, be presented and surrendered as aforesaid." The bond also declares that it is "covenanted and agreed by and between the said company and the present and future holders of the bond, and the interest warrants or coupons thereto annexed, that the words 'net earnings' in this bond, and in each of said warrants or coupons, signify the amount remaining of the income of said company from its railroad and other property during each such period, after satisfying and discharging all the expenses, interest, and other charges aforesaid, and that the board of directors of said company shall determine the amount of such net earnings in each of such periods as aforesaid." The coupon contains the same condition expressed in fewer words, and is a promise on the part of the company to pay the sum named, "or so much thereof as its net earnings for the year then ending according to the terms of the bond will pay." The property mortgaged includes the railroad of the company, and all its branches, "together with the franchise of the company, of operating and carrying on the same, and all income and profits, and all privileges, rights, and real estate, now owned by said company, or which may be hereafter owned or acquired by it," with an exception not material here, together with all its rolling-stock, "and other property now owned, or hereafter to be owned or acquired, by said company, and in any way belonging or appertaining to the said railroad of said company."

By the terms of the mortgage it is subject to the right of the railroad company, its successor or assigns, to retain the free and uncontrolled use, enjoyment, possession, and management of the premises, rights, and property, granted, or intended so to be, so long as it shall pay the principal and interest of said first consolidated mortgage bonds, and the principal of said income mortgage bonds according to their terms, and shall keep its covenants and agreements in this deed or mortgage contained. So, also, the condition which, when performed, is to annul and make void the mortgage, is in terms the payment of the first class of bonds, both principal and interest, and the principal only of the second class or income mortgage bonds. These things are restated by an express covenant and agreement between the parties to the mortgage "for themselves and their successors and assigns, and for all parties who shall become

interested as holders or owners of the bonds in manner following; that is to say, First, that this mortgage is given to secure, primarily, the payment of the principal and interest of said first consolidated mortgage bonds of said party of the first part, and, secondarily, after the payment in full of said first consolidated mortgage bonds, and the then accrued interest thereon, the payment of the principal (but not the interest thereon) of said income mortgage bonds;" second, that the company will pay at maturity the principal, and, as it accrues, the interest of the first consolidated mortgage bonds, and the principal of the income bonds. In other respects the same care is exercised in distinguishing between the two classes of bonds, and the rights of the holders of interest coupons attached thereto; and when at last provision is made for the distribution of proceeds arising from a forced sale under the mortgage, it is directed to be paid, first, upon expenses, etc.; second, upon the interest due on the first class of bonds, then upon the principal of those bonds; and, lastly, if any part remains, upon the principal of the income bonds, making no mention of the interest on those bonds; and so marked is this line of exclusion that, contemplating the possibility that something might be left after meeting claims thus enumerated, it provides that, if any surplus remains, it shall be paid over, not to the holder of interest coupons of the income bonds, but to the mortgagor. The mortgage also provides that whenever and as often as the company, its successors or assigns, shall acquire any franchises, lands, equipment, or other property, or interest of any name or nature, for the use of or in connection with its railroad, or for the purpose of its incorporation, it shall be held subject to the lien and trusts of the mortgage, and further mortgage or assurance shall be given upon it if requested. There are no other provisions bearing upon the proposition before us; and upon those the plaintiff's position is that the income of the defendant, as that phrase is defined in the mortgage from which we have quoted, is charged with the payment of the plaintiff's bonds, and is not applicable to any contract subsequently entered into until that charge is extinguished. The defendant's contention is that notwithstanding the terms of the bond and mortgage, its income may be applied to the extension of its road, or to the promotion of any undertaking within the line of its corporate powers, and which in the judgment of its directors acting in good faith will be for the advantage of the company, and promote its interests, although such application should so diminish, or even altogether absorb, the fund that no part would remain for payment upon the interest of the income bonds.

The statute declares that every corporation organized as the defendant was, under the act of 1850 (chapter 140, § 5), shall

have a board of directors to manage its affairs, and it must follow that, so long as no provision of law is violated, they are subject to no other supervision than that of the legislature. The plaintiffs, so far as any claim is now involved, are simply contract creditors, having a debt against the corporation, but no lien by mortgage, and with no other right than to have it paid out of the proper fund, viz., its "net earnings," the amount of which is to be determined by its board of directors at the expiration of each interest period; and such is the effect and the language of the agreement between the parties that, if at one time there should be found a deficiency of income, and at another a surplus of income, the surplus cannot be applied to make up the deficiency then existing, nor reserved to apply upon a subsequent deficiency. Each interest period stands by itself, and the earnings of one period cannot be applied upon any interest coupon except the one for that period. They are not cumulative, and the inquiry at any given period must be whether earnings have accrued during the particular year for which they are demanded; and as the amount is to be determined at specified times and by the directors, so the parties, as we have seen, agreed upon the elements from which such determination should be made. It is not the whole income, but so much as remains of the income of the company after satisfying the expenses of operating and maintaining the road, with all taxes, assessments, and floating indebtedness, and the interest on all lien, charges, incumbrances, and other indebtedness, on the property of or owned by said company. This is at most an agreement to pay dividends if dividends are earned.

The contention of the learned counsel for the respondent, and the effect of the judgment below, is that the power of the company to change the condition of the road, although by additions or extensions and improvements, consistent with the purposes of its incorporation, is limited and restrained by those provisions. It does not seem probable that such was the intention of the parties. The bonds are to run 40 years. The earnings are to be determined at the end of each year. Did the parties suppose that in the meantime the road was to be stationary, or that the developments which time and the competition of new roads or a demand for greater facilities would require should be applied only to the road as it existed at the time of the mortgage? When they speak of the expenses of operating and maintaining the road, do they mean the road as it was in 1880? Was it supposed that no changes were to be provided for within the 40 years? If so, for what purpose was the agreement made and put into the mortgage that if and whenever and as often as the company should in any manner acquire any franchises of any nature or description, lands, or other property for the use of its railroad, or

in connection with its railroad, they should be held subject to the lien and trusts of the mortgage or other conveyance made, if necessary, to convey them to the trustees? Such is the agreement, and from that it is plain the parties had in view the prospective wants of the railroad. They must be deemed to have understood that those wants would be supplied in the usual manner: if upon credit, that an indebtedness would be created, and if for cash, that both the indebtedness contracted and the cash paid must come either from the earnings of the company or a sale of its property. In either event, it would reduce the income provided for, but at the same time add a new source of income of which the bondholder would have the benefit. In short, a fair and just construction of the agreement, as expressed in the bond, requires us to hold that the parties contemplated a line of active and efficient railroad, and not a line of road in suspense or liquidation. In other words, they provided for a road to be managed in the usual manner, according to the discretion and judgment of its directors. Changes so occasioned might at one time diminish, and at another increase, the net earnings of the road. The operating expenses would be constantly liable to change. Uniformity is not bargained for nor promised. If that was intended it is difficult to see why the bond or mortgage did not provide that the operations of the company during the 40 years of credit should be confined to the running of its road between the then *termini*, instead of providing for the acquisition of new franchises, and the subjection of them to the lien of the mortgage. Nothing is said against making the road more useful by improvements or by new tracks, terminal facilities, elevators, leased roads, or otherwise, although at an increased expenditure. The implication from the terms used is quite the other way. Nor do I find anything in the provisions regulating the rights of the parties which sustains in any manner the contention denying the power of the directors to use the earnings of the corporation for such improvements or other lawful purposes in its business as they may think best. I have already given at length the phrases of the bond and mortgage on which reliance is placed, and it is obvious that there are none which in terms declare such prohibition, nor do I think that the construction contended for is warranted by the words actually used; and that, in according to that construction, the court below has inserted by implication that which the parties have not expressed, and which in view of the precise language employed they seem to have intentionally avoided.

It is not alleged that any portion of the earnings actually remains in the hands of the company beyond a sum sufficient to discharge obligations due from it, but that there would have been, and will yet be, a sum of money to be applied upon the in-

come bonds, provided the payments already made upon the lease are cancelled, and no others provided for. That is not to the point. As the lease is valid, and within the powers of the company, and the company entitled to receive all the earnings, they must be applied in the discretion of the directors, and the payments already made must stand.

If these views are correct, it is unnecessary to consider other questions raised by the appellant, and which are not without force; for it follows that there has been no misapplication of the funds or earnings of the road, that there has been no diversion of them from any purpose for which they were intended, nor any violation of the contract under which the plaintiff's claim. The complaint therefore fails to state a cause of action, and the defendant could not properly be required to answer. It follows that the demurrer was well taken.

The judgment appealed from should be reversed in both courts, the order of the special term overruling the demurrer should be reversed, and the defendant have judgment dismissing the complaint, with cost.

All concur.

Power to Lease.—See State *v.* Atchinson, etc., R. Co., 32 Am. & Eng. R. R. Cas. 388; note, 32 Ib. 409-410.

Receivers—Liability for Rent of Leased Line.—In the case of Brown *v.* Toledo, P. & W. R. Co., 35 Fed. Rep. 444, it was held that, where one railroad company leases the property of another, agreeing to pay as part of the rent interest on certain mortgage bonds, non-payment of the rent and interest being a cause of forfeiture, receivers of the lessee company, appointed by the court to preserve its system intact for the benefit of the company and its creditors, are liable for the rent and interest accruing during the term of their receivership.

Same—Priorities.—In the case of the Central Trust Co. *v.* Wabash, St. L. & P. R. Co., decided March 19, 1888, by the United States circuit court for the last district of Missouri, the property of defendant railway company was made up of the consolidation of a number of lines, some of which were taken by purchase, and some by lease. Nearly all of these lines were subject to prior mortgages, and there was also two general mortgages on the consolidated system. Defendant filed a bill confessing insolvency, and asking the appointment of receivers to administer its assets among its creditors. The lessor companies were made defendants, and an order was made appointing receivers to operate the entire system. It was also provided that any lessor might at any time assert his right to possession of lines leased by him for unpaid rent. *Held*, that the taking possession of leased lines by the receivers did not make them assignees of the leases, so as to make the rentals due under such leases prior to the mortgages.

Expense of Receivership—Charging on Leased Line.—Where the court appoints receivers for a railroad company, for the benefit of that company and its creditors, no part of the expenses of the receivership are chargeable against the property of another railroad company, leased by the insolvent company, the receivership not being for the benefit of the lessor or its creditors. Brown *v.* Toledo, P. & W. R. Co., 35 Fed. Rep. 444.

PAYNE

v.

KANSAS CITY, ST. JOSEPH, AND COUNCIL BLUFFS R. CO.

(*Iowa Supreme Court.*)

Fences—Iowa Statute—Construction of Gate.—No mode of constructing gates being prescribed by the Iowa Statute, which imposes upon railroad companies the duty of fencing their track, if the gate is sufficient to turn stock, it may be constructed either so as to open towards the pasture of land designed to be fenced against, or so as to open towards the railroad track, nor does it matter that the fastening, e.g., a hook, is on the side next to the pasture, if it be sufficient to securely fasten the gate.

Same—Sufficiency of Fastening.—When a gate opens outwards upon a railroad track the fastening is not sufficient if the gate opens by mere pressure against it—cattle naturally haunting a gate where they are accustomed to pass out and in, and being liable to crowd each other against it.

Same—Failure to Fence—Gate—Insufficient Fastening.—Under a statute which provides for double damages for stock killed or injured through the failure of a railroad company to fence its track, a gate is part of the fence, and if it is insufficient to turn cattle there is a failure to fence within the meaning of the statute, and this rule is not altered by the fact that the insufficiency is caused by reason merely of the fastenings being out of repair.

Same—Evidence—Prejudicial Error.—Although there is no obligation upon a railroad company to hang a gate upon any particular side of a fence, the admission of testimony that there is nothing to prevent the hanging of the gate on the inside of the field cannot prejudice the defendant in an action to recover for stock killed, when the court instructs the jury that the defendant had the right to hang the gate on either side.

Same—Opening of Gate.—In an action to recover damages for the killing of stock by reason of the insufficiency of a gate, evidence tending to show that there were calves on the other side of the right of way, belonging to the cows in question, is admissible for the purpose of showing that the gate was opened by the pressure of the cows against it, and not, as defendant claimed, left open by some one.

Same—Insufficiency of Similar Fastenings.—Evidence tending to show that other fastenings similar to the fastenings of the gate in question had proved insufficient in practice is admissible, if the jury is told that before such evidence can be considered it must be shown not only that the fastenings are alike, but that the manner in which they were put on and the manner of hanging the gates are in all respects alike.

Same—General Use.—Where it is claimed that a railroad company is liable by reason of the insufficiency of the fastening of a gate, evidence that the fastening in question was like those in general use is not admissible, the liability of the company being dependent only upon the sufficiency of the particular fastening.

APPEAL from District Court, Freeman County.

Action under Iowa Code, section 1289, against Kansas City, St. Joseph & Council Bluffs R. Co., to recover double dam-

ages for the killing of certain cows by one of the defendant company's trains. The defendant appeals from a verdict and judgment for the plaintiff. The case is stated in the opinion.

Supp & Pusey for appellant.

T. C. Powers and *Draper & Thormell* for appellee.

ADAMS, C.J.—The defendant's road passed through the plaintiff's pasture, and, while fences had been constructed upon each side, it is maintained by the plaintiff that they were insufficient to turn the plaintiff's stock, and that the animals which were killed were killed by reason of a want of a fence, within the meaning of the statute. In the fence in question was a private crossing, where the defendant had erected and was maintaining gates for the plaintiff's accommodation. The plaintiff's cows, which were killed, passed upon the defendant's track through one of the gates. The principal question of fact is as to whether the gate was properly constructed. If it was not, we think that the jury was justified in inferring that it came open by reason of its improper construction, and was justified in finding that the cows were killed by reason of a want of a fence.

Facts—Question presented.

1. The defendant assigns as error that there was no evidence to support the finding. Its position is that the undisputed evidence respecting the gates shows that it was sufficient. The facts respecting the gate appear to be that it was fastened by a hook on the pasture side, and was so constructed as to swing out toward the right of way. The hook where it entered the staple was not bent quite at right angle, but at an obtuse angle, or else the lower point flares out a little to facilitate the inserting of it in the staple.

Sufficiency of gate—Evidence.

The defendant contends that it had no right to construct the gate so as to swing in towards the pasture; that it cannot be said to be negligence to construct the hook on the pasture side; and that the form of the hook was the usual and necessary form. Upon this point it may be said that the law does not prescribe the mode of constructing gates, and, so far as the question before us is concerned, it is not material how they are constructed, provided they are sufficient to turn stock. We see no good reason why they may not be constructed so as to open towards the pasture or land designed to be fenced against, and perhaps, if they are so constructed as to swing towards the right of way, that might be regarded as tending to render them less secure. At the same time we have no doubt that a secure gate might be constructed, if made to swing the other way. The fact, too, that the hook was on the inside next to the pasture or land inclosed, would not necessarily show improper construction. It might, we presume, be on that

Same—Fastening to gate.

side, and the fastening be secure, even though it were safer, as a rule, to put it where it would not be exposed to disturbance from the horns of the cattle. So the hook might flare out at the point, and yet be turned at a right angle or acute angle, and have no tendency to unfasten by mere pressure against the gate. It was for the jury to say, in view of all the facts proven, whether the fastening was sufficient. One thing seems to be certain, and that is that the fastening was not sufficient if the gate would open by mere pressure against it, because cattle naturally haunt a gate where they are accustomed to pass out and in, and are liable to crowd each other against it. As to the liability of the gate to fly open by pressure against it, there was considerable evidence. One witness said: "The pressure of a man, very slight, against the gate, would throw the hook out of the staple. I know, because we tried it." Another said: "A pressure against the gate would throw the hook out of the staple." It seems very clear to us that we cannot disturb the verdict for want of support in the evidence.

2. The court instructed the jury, in substance, that, if the plaintiff was entitled to recover anything, he was entitled to recover double the value of the animals killed. The defendant assigns the giving of this instruction as error. It is said that this is not a case where the company failed to fence, and so does not fall under the provision for double damages, as made in section 1289 of the Code. It is true that the fence seems to have been good enough, except the fastenings of the gate, but the gate is a part of the fence; and, if that was insufficient to turn cattle, it appears to us that there was a failure to fence, within the meaning of the statute. It may be, as is suggested, that the fastenings were merely out of repair; but this would make no difference in respect to the rule laid down by the court. It would still be true that the defendant's liability, if it arose at all, arose by reason of a want of a fence, and the provision for double damages would apply. The defendant suggests that there might have been a want of repair of so recent origin that the company was not in fault. If that is so, the company was not liable at all for such want of repair, and the jury was instructed merely that the plaintiff was entitled to double damages, if anything.

Failure to fence within meaning of statute—Double damages.

3. A witness was allowed to testify, against the defendant's objection, that there was nothing, so far as he knew, to prevent hanging the gate on the inside of the field. The admission of this evidence is assigned as error. The court instructed the jury that the defendant had the right to hang the gate on either side. Under his ruling, we cannot think that the defendant was prejudiced

Evidence as to hanging gate on inside.

by the evidence. It may be said that the admission of the evidence implied that the court thought that it would have been better to hang the gate on the inside, if it could be. To this we think it may be said that it would have been better if the hook was so constructed that mere pressure from the inside would not cause the hook to fly out, and there was evidence to show that it would.

4. The defendant complains of the admission of evidence tending to show that there were calves on the other side of the right of way belonging to the cows in question. We think that this evidence was properly admitted. It was a circumstance tending to show that the gate was opened by the pressure of the cows against it, and was not, as the defendant claimed, left open by some one.

Calves on either side of right of way.

5. The defendant complains of the admission of evidence tending to show that other like fastenings had proved insufficient in practice. Under the guarded instruction of the court, we think that there was no error in this. The jury was told that, before such evidence could be considered, it must be shown, not only that the fastenings were alike, but that the manner in which they were put on, and the manner of hanging the gates, were in all respects alike.

Insufficiency of similar fastenings.

6. The defendant offered to show that the fastenings in question were like those in general use, but the court excluded the evidence, and the defendant assigns the exclusion as error. We do not think it was sufficient for the defendant to show that it used fastenings of the kind in general use, and that the one in question was of that kind. The fastening should have been reasonably sufficient to answer the purpose intended. If it was not, we do not think that the defendant could escape liability by showing that it was in general use. If there had been an offer to show that the fastenings in general use were not only like this, but had been applied to the gates in the same way, and the gates had been hung in the same way, and all the material circumstances had been alike, and that they had proved in practice to be sufficient, it may be that such evidence would have been admissible; but there was no such offer. The defendant complains of the exclusion of an opinion that the fastening was sufficient, but the question was not one for expert evidence.

Same—General use.

7. The defendant criticises to a considerable extent the instructions which were given. We cannot properly set out all the instruction, nor notice specifically all the criticisms which are made. The criticisms, in a general way, amount to this: that the jury was not properly instructed in regard to the duty which devolved on the de-

Criticism of instructions.

fendant in order to enable it to escape liability of the kind in question. We have all read the instructions carefully, and are agreed that the case was fairly submitted under them. The court charged the jury as follows: "The main questions in this case, so far as the liability of the defendant is concerned, are whether or not the fastenings of the gate were safe and reasonably sufficient for the purpose for which they were used; and, if they were insufficient for that purpose, whether or not the cattle of the plaintiff got upon the track of the defendant, and were injured by reason of such insufficiency." Then, proceeding a little further, the court put this question in its charge: "Were the fastenings on this gate such, and put in such a place, and on in such a way, as a man of usual and ordinary prudence would consider safe and sufficient to be used in the place and for the purpose for which this fastening was used?" These instructions appear to us to cover the ground fairly, and we do not see that the court said anything inconsistent therewith.

We see no error, and the judgment must be affirmed.

Railway Fences—Gates.—Railway companies are required to make gates and bars, and suitable crossings between adjoining farms along the right of way (Mackie *v.* Central Railroad of Iowa, 54 Iowa, 540), and may erect them at any place along the road. Detroit, G. H. & M. R. Co. *v.* Hayt, 55 Mich. 347. If the company or its servants or customers carelessly leave such gates or bars open, or insufficiently fastened, by reason of which injury happens to the property of another, the railroad company will be liable. See Toledo, Wabash & Western R. Co. *v.* Nelson, 77 Ill. 160; Chicago & N. W. R. Co. *v.* Harris, 54 Ill. 528; Cleveland, C., C. & I. R. Co. *v.* Swift, 42 Ind. 119; Indianapolis & C. R. Co. *v.* Logan, 19 Ind. 294; Spinner *v.* New York Central & H. R. R. Co., 67 N. Y. 153; s. c., 6 Hun (N. Y.), 600; 4 T. & C. (N. Y.) 595; Fawcett *v.* York & N. M. R. Co., 20 L. J. Q. B. 222. Where gates are left open by persons other than the company, its servants or customers, the company will be liable in those instances where it has had actual or constructive notice of the defect and reasonable time to repair it before the injury happens, but not otherwise; what is a reasonable time depends in all instances upon the circumstances of the particular case. See Chicago & A. R. Co. *v.* Saunders, 85 Ill. 288; Chicago & A. R. Co. *v.* Umphenour, 69 Ill. 198; Toledo & W. R. Co. *v.* Daniels, 21 Ind. 256; Indianapolis & St. L. R. Co. *v.* Hall, 88 Ill. 368; Toledo, W. & W. R. Co. *v.* Cohen, 44 Ind. 444. But the company will not be liable unless it is shown that the gate was open so long as to raise a presumption that the employees of the company knew it. Chicago, B. & Q. R. Co. *v.* Magee, 60 Ill. 529.

Duty of Land-owner to Give Notice.—It is said to be the duty of the adjacent land-owner to be vigilant in noting open gates or defendant's fences, and in giving notice thereof to the company; that he has no right to fold his arms and permit his stock to stray upon the track through any deficiency in the fences or gate, which the company are bound to maintain. Chicago, B. & Q. R. Co. *v.* Seirer, 60 Ill. 295; Poler *v.* New York C. R. Co., 16 N. Y. 476, 481.

Gate Left Open by Land-owner.—A railroad company will not be liable for injuries to stock, if the gate or bars through which the cattle pass onto the track was left open by the plaintiff or a third person, unless they

had continued open for such a length of time or under such circumstances as to justify the inference of negligence on the part of the company in not seeing and closing them. See Koutz *v.* Toledo, W. & W. R. Co., 54 Ind. 515; Davis *v.* Chicago, R. I. & P. R. Co., 40 Iowa, 292; Perry *v.* Dubuque & S. W. R. Co., 36 Iowa, 102; Aylesworth *v.* Chicago, R. I. & P. R. Co., 30 Iowa, 459; Grand Rapids & I. R. Co. *v.* Monroe, 47 Mich. 152; Toledo, C. S. & D. R. Co. *v.* Eder, 45 Mich. 329; Robinson *v.* Grand Trunk R. Co. of Canada, 32 Mich. 322; Clardy *v.* St. Louis, I. M. & S. R. Co., 73 Mo. 576; Harrington *v.* Chicago, R. I. & P. R. Co., 71 Mo. 384; Hook *v.* Worcester & N. R. Co., 58 N. H. 251; Morrison *v.* New York & N. H. R. Co., 32 Barb. (N. Y.) 568; Munch *v.* New York C. R. Co., 29 Barb. (N. Y.) 647; Hodge *v.* New York C. & H. R. R. Co., 27 Hun (N. Y.), 394; Wheeler *v.* Erie R. Co., 2 T. & C. (N. Y.) 634; Richardson *v.* Chicago & N. W. R. Co., 56 Wis. 347; Goddard *v.* Chicago & N. W. R. Co., 54 Wis. 548; Laude *v.* Chicago & N. W. R. Co., 33 Wis. 640; Davidson *v.* Central Iowa R. Co. (Iowa), 39 N. W. Rep. 163.

Where Gates are Allowed at Farm Crossings for the convenience of an adjoining land-owner, he is bound to keep them closed; and if he fails to do so, and his animals pass through them and onto the railroad track, where they are injured or killed, he is not entitled to recover from the company on the ground that it has neglected to fence his track or to keep such fence repaired as required by statute. See Bond *v.* Evansville & T. H. R. Co., 100 Ind. 301; s. c., 23 Am. & Eng. R. R. Cas. 200; Evansville & T. H. R. Co. *v.* Mosier, 101 Ind. 597. *Compare* Pennsylvania Co. *v.* Spaulding, 39 N. W. Rep. 269.

For a full discussion of the subject of gates and bars in railway fences, the duty of the company to maintain the same and its liability, see 7 Am. & Eng. Encyc. of L., tit. "Fences," II., 2, (*d*), iv.

As to Duty of Company to Fence, see Rinear *v.* Grand Rapids & I. R. Co., *post*; Wilder *v.* Chicago & W. M. R. Co., note.

Sufficiency of Fence—Drifted Snow.—In Patten *v.* Chicago, Milwaukee & St. Paul R. Co. (Iowa), 39 N. W. Rep. 708, a colt belonging to plaintiff went upon a track of the defendant company by crossing a fence upon the snow which was of such depth and was so drifted as to be nearly as high as the fence. It was held that if the fence was sufficient as originally constructed, and became temporarily defective by reason of the snow drifting against it, the company was not liable under the Iowa double damage act, and also that there was no duty imposed upon the company to remove the snow and drift from the fences. The court say: "The district court held that the defendant was liable as for the absence of a fence along its track, or the insufficiency thereof when the snow was drifted or fell to such a depth that cattle could cross over the fence on the snow, after sufficient time had elapsed to enable defendant to discover such snow and snow-drifts and provide a remedy for the exposure of the railroad thereby. The district court regarded the snow and snow-drifts as defects in the fence, and that unlawful delay or neglect in remedying them would render defendants liable as for failure to maintain a sufficient fence. We are of the opinion that these views of the question are incorrect.

"The defendant is charged with the duty of erecting fences, or, rather, is liable for double damages in cases of this character, if it omits to erect fences. But its duty and liability is recognized by the law to the end that live-stock may be kept from its track. It is required to do no more than to erect such fences as under ordinary circumstances will secure the protection intended. It is not required to build fences which will resist the power of the elements, or are so high that the snows of our winters will never cover them. Fences of the character and height required by the statute for the control of live-stock ought to be constructed by the railroads. It would

be unreasonable to require them to build fences of a different character. Nor can the railroads be required to do that which the farmers never attempt, namely, to remove the snow and drifts from their fences."

As to insufficiency of fence, see, *post*, Missouri Pacific R. Co. *v.* Metzger, and note.

UNION PACIFIC R. CO.

v.

BLUM.

(*Nebraska Supreme Court, February* 15, 1888.)

Fence—Killing Stock—Evidence.—In an action against a railway company, to recover damages for the loss of a cow killed by its engine, the defence was that the cow was killed on the public road, and without negligence on the part of the company. The engineer testified that the engine struck the cow on the crossing of a public road over the railway, and carried or threw her 30 or 40 feet, but there were no marks on the ground indicating that the cow had been struck at that point. The distance from the road-crossing to the cattle-guard was 43 feet, and from that point to a place where there were marks on the railway track tending to show that the cow had been struck was 54 feet, the cow being thrown from 8 to 12 feet east and south of that point. *Held:* First, that the evidence failed to show that the cow was killed on the road-crossing; second, that a clear preponderance of the evidence showed the railway fence to be in a defective and imperfect condition, and that the cow was killed within the right of way.

ERROR to District Court, Douglas County.

Action by John Blum against the Union Pacific R. Co. for damages for the killing of a cow by a train belonging to defendant. Judgment for plaintiff, and defendant brings error.

A. J. Poppleton and *J. S. Shropshire* for plaintiff in error.

D. Van Etten for defendant in error.

MAXWELL, J.—This case was commenced by the defendant in error against the plaintiff in error before a justice of the peace in Douglas county, and judgment rendered by the justice. The case was then appealed to the district court, and judgment rendered in favor of the plaintiff below. **Facts.** The plaintiff below filed his petition in the district court, claiming $75 for the value of a cow alleged to have been killed by a train of the defendant on the 17th day of June, 1886; that the killing occurred by reason of the inadequacy of the fences and cattle-guards at a point where the company was bound by law to keep its track fenced, not being within the limits of any town, city, or village; that the killing occurred by reason of the negli-

gence and carelessness of the defendant in operating said train; that the cow was of the value of $75; that the plaintiff was injured and damaged thereby in the sum of $150, and interest from June 17, 1886; that on or about the 17th day of June, 1886, the plaintiff served upon the defendant a written notice, with the plaintiff's affidavit thereto attached; that the said defendant did not, within 30 days after the service of said notice and affidavit, pay or offer to pay the value of said cow, or any part thereof. The defendant below, in its answer, admitting its obligation to fence its road as alleged in the petition, claims that on the 17th day of June, at the point of the alleged killing of the said cow, the road of said defendant was properly and suitably fenced on both sides thereof, with proper and sufficient cattle-guards and cross-fences, as required by law; that said cow was not killed on said defendant's track at any point where the defendant was by law obliged to erect and maintain fences, but that the same was killed at a road-crossing at a point where the said company was not obliged to fence its track on either side; that said cow was not killed by any negligence or carelessness on the part of the defendant, its servants, agents, or employees, or for lack of a fence, as required by law; that said cow was permitted by its said owner to run at large in the night-time; that it was struck by an engine of the railway company, in the night-time, on the said railway-crossing, without any fault or carelessness on the part of the defendant; and alleges, on the other hand: that the killing of said cow was through the negligence of the plaintiff contributing thereto; denies that defendant was guilty of any negligence whatever in the killing of said cow; denies that the said cow was of the value of $75; and denies that plaintiff was damaged in the sum of $150, or in any sum whatever, by reason of any negligence on the part of the defendant. The reply was a general denial. On the trial of the cause, the jury returned a verdict in favor of Blum for $75 and interest. A motion for a new trial was thereupon made by the railway company, which was overruled, and judgment entered on the verdict.

Evidence that cow was killed at crossing.

The testimony tends to show that the cow in question was killed on the Union Pacific R. about two and one half miles west of Millard. As to the killing there is no dispute, the contest on the part of the railway company being that the cow was on the railway at the crossing of a public road, and hence the company was not liable unless guilty of negligence. The engineer in charge of the engine which killed the cow testified that he was running at the rate of 20 miles an hour, going east; that the cow was lying down in the wagon track at the crossing of the railway, and that the engine carried or threw her 30 or 40 feet, she being thrown to the right or south side of the railway track. No marks are

testified to, however, as having been found, at the crossing of the highway and the railroad, tending to show that the cow had been struck by the locomotive at that point. On the part of Blum, it is clearly shown that the distance from the point indicated by the engineer where the cow was struck, to the cattle-guard, on the east was 43 feet. This is not denied. It is also proved that the carcass of the cow was found sixty feet or more south of the said cattle-guard, on the company's right of way, and south of the track from 8 to 12 feet, the witnesses not agreeing as to the distance. It is also proved, and not denied, that at a poiut 54 feet east of said cattle-guard there were marks on the railway track indicating that the cow had been struck by the engine at that place, and the carcass was found east and south of that point from 8 to 12 feet. It is also proved that the right of way is fenced with wire, except at the road-crossing, boards being used from the side fences to the cattle-guards, such fence consisting of three six-inch boards. It also appears that in one of the panels of said board fence the upper and lower boards were missing, leaving on the posts the middle board, which was from three feet to three and one half feet from the ground. There is a feeble attempt on the part of the railway company to prove that the boards in question were nailed onto the posts on the day preceding the accident, but the overwhelming weight of testimony is that they had been missing for several days. Blum is the owner of the land on both sides of the railway track, and testifies that his cow was kept in a pasture adjoining the right of way, and that he was unable to account for her escape from the pasture. The testimony also shows that at the time of the accident there was good grazing on the right of way away from the track, and there is reason to believe that the cow was tempted onto the right of way by reason of the grass growing thereon. It is very evident, from the testimony, that the cow was killed within the inclosure of the right of way, and not on the public road; and the jury would not have been warranted in finding otherwise than they have done. It is apparent that the engineer was mistaken in his testimony that the cow was killed on the public road. It is very clear that justice has been done, and the judgment is affirmed.

The other judges concur.

Injuries to Animals at Crossings.—See, generally, Union Pacific R. Co. *v.* Harris, 11 Am. & Eng. R. R. Cas. 431; Union Pacific R. Co. *v.* Wilson, 11 Ib. 547; Goodwin *v.* Chicago etc., R. Co., 11 Ib. 460; Cleveland, etc., R. Co. *v.* Newbrander, 11 Ib. 480; Braxton *v.* Hannibal, etc., R. Co., 13 Ib. 494; Lynn *v.* Chicago, etc., R. Co., 18 Ib. 651; Lane *v.* Kansas City, etc., R. Co., 15 Ib. 562; Missouri Pac. R. Co. *v.* King, 15 Ib. 529; Alabama, etc., R. Co. *v.* McAlpine, 15 Ib. 544; Pittsburg, etc., R. Co. *v.* Staler, 19 Ib. 381; Meeker *v.* Chicago, etc., R. Co., 19 Ib. 477; Chicago, etc., R. Co. *v.* Kendig,

19 Ib. 493; Kansas City, etc., R. Co. *v.* Turner, 19 Ib. 406; Kendrick *v.* Chicago, etc., R. Co., 22 Ib. 595 note.

Defective Fences.—For a full discussion of the subject of defective fences and the liability of the company to repair, and the like, see 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II., 2, (*d*), *v.*

Killing Stock.—As to killing stock by railroad company, see, *post*, Rhines *v.* Chicago & N. W. R. Co., 123, and note 125; Emmons *v.* Minneapolis & St. L. R. Co., 126, and note 128; Johnson *v.* Chicago & N. W. R. Co.; Vallean *v.* Chicago, M. & St. P. R. Co.; Molair *v.* Port Royal & A. R. Co.; Dennis *v.* Louisville, N. A. & C. R. Co.; Savannah, F. & W. R. Co. *v.* Rice; Missouri Pac. R. Co. *v.* Metzger; Alabama, Gt. South. R. Co. *v.* Smith; Jones *v.* Americus, Preston & Lumpkin R. Co.; Kentucky Cent. R. Co. *v.* Kinney.

Killing Stock—Evidence.—In an action for injuries to stock, the owner must show that the company was bound to fence at the point where the animals got upon the track, Louisville, N. A. & C. R. Co. *v.* Goodbar, 102 Ind. 596; Ft. Wayne, C. & L. R. Co. *v.* Herbold, 99 Ind. 91; Wabash, St. L. & P. R. Co. *v.* Tretts, 96 Ind. 450; s. c., 19 Am. & Eng. R. R. Cas. 601; Lake Erie & W. R. Co. *v.* Kneadle, 94 Ind. 454; s. c., 19 Am. & Eng. R. R. Cas. 564; Louisville, N. A. & C. R. Co. *v.* Quade, 91 Ind. 295; s. c., 19 Am. & Eng. R. R. Cas. 595; Louisville, N. A. & C. R. Co. *v.* Overman, 88 Ind. 115; s. c., 13 Am. & Eng R. R. Cas. 648; Jeffersonville, M. & I. R. Co. *v.* Lyon, 72 Ind. 197; s. c., 2 Am. & Eng. R. R. Cas. 648; Jeffersonville, M. & I. R. R. Co. *v.* Brevoort, 30 Ind. 324; Bellefontaine R. Co. *v.* Suman, 29 Ind. 40; Toledo, W. & W. R. Co. *v.* Howell, 38 Ind. 447; Cecil *v.* Pacific R. Co., 47 Mo. 246; Morrison *v.* New York & N. H. R. Co., 32 Barb. (N. Y.) 568; Bennett *v.* Chicago & N. W. R. Co., 19 Wis. 145; unless the stock injured got upon the track or ground at a point where the company was not required to fence,—Bremer *v.* Green Bay, S. P. & N. R. Co., 61 Wis. 124. See Smith *v.* Chicago, M. &. St. P. R. Co., 60 Iowa, 512; Fickle *v.* St. Louis, K. C. & N. R. Co., 54 Mo. 219; Walter *v.* Missouri P. R. Co., 78 Mo. 276.

As to evidence in case of stock-killing, see, *post*, Rhines *v.* Chicago & N. W. R. Co., 123; Memphis & C. R. Co. *v.* Hembree, 128 and note, 130; Molair *v.* Port Royal & A. R. Co., and note; Savannah, F. &. W. R. Co. *v.* Rice; Kansas City, L. & S. R. Co. *v.* Bolson; Atchison, T. & S. F. R. Co. *v.* Miller.

For a full discussion of the subject, see 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II., 2, (*d*), and viii. 3 (*a*).

RHINES

v.

CHICAGO AND NORTHWESTERN R. CO.

(*Iowa Supreme Court, October* 23, 1888).

Fences—Killing Stock—Verdict—Sufficiency of Evidence.—If, in an action to recover double damages for stock killed through the failure of a railroad company to fence its track, the jury are instructed that the plaintiff can only recover when he proves that the animals entered the track through an opening in the fence, the verdict necessarily implies a finding that the animals so entered the track, and is not supported by sufficient evidence, if it only appears that the animals were upon the track at a point nearer the opening than a certain street-crossing, but could not be tracked from that point to either the crossing or the opening and could have reached it as readily from the one as the other. Beck, J., dissenting.

Same—Obligation to Fence—Province of Jury.—Under a statute which requires a railroad to be fenced when it is fit and suitable in view of the public convenience, but which provides that the depot grounds need not be fenced when the interest of the road and the public require it, the question whether the railroad company is bound to maintain a fence at a point where an opening has been made for the accommodation of a single shipper is properly left to the jury.

APPEAL from District Court, Tama County.

Action by Jackson Rhines against the Chicago & Northwestern R. Co., to recover double damages for the killing of two horses upon defendant's track at a point where it was required to fence its track against live-stock, running at large, but had failed to maintain a sufficient fence. Defendant appeals from a verdict and judgment for plaintiff. The opinion states the case.

Hubbard & Dawley for appellant.

W. H. Stivers and *J. G. Strong* for appellee.

REED, J.—1. The injury occurred in defendant's yard at Tama City. The yard was inclosed by a fence, which, as originally constructed, was sufficient to turn live-stock. The railway was intersected immediately west of the yard by one of the streets of the town, and in the original construction of the road a cattle-guard was built in the track at that point, but it was afterwards planked over. An opening about 15 feet in width had also been made in the fence on the north side of the yard some time before the injury, and this remained open at the time. The horses entered the yard either through

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this opening or at the unguarded street-crossing. Plaintiff's theory is that they entered through the opening. True, it is not expressly alleged in the petition that that was the point of entrance. But it is alleged that the injury was occasioned by defendant's failure to maintain a sufficient fence, and the damages sought to be recovered is double the value of the property; and, if the street-crossing had been the place of entrance, the injury would have been occasioned, not by the failure to maintain a sufficient fence, but by the failure to maintain a cattle-guard, and in that case plaintiff would not have been entitled to recover more than the actual damages. Moriarty *v.* Railway Co., 64 Iowa, 696; s. c., 20 Am. & Eng. R. R. Cas. 438. The court instructed the jury, in effect, that plaintiff was not entitled to recover unless he had proven that the animals entered the yard through the opening. The verdict of the jury, then, necessarily implies a finding that the animals entered the yard through the opening; and the first question argued by counsel is whether that finding is supported by the evidence. The recovery, it is proper to say, was for double the value of the animals. There was no direct evidence as to which was the place of entrance, but plaintiff sought to establish his theory by the circumstances. It was proven that the horses went upon the track from the north (which was the side towards the opening), at a point about 300 feet from the opening and about 1000 feet from the street-crossing; but they could not be tracked from that point to either the crossing or the opening, and they could have reached it as readily from the one as the other. The question, then, is, not as to what facts were proven, for as to them there was no conflict or dispute, but is whether the conclusion essential to the establishment of plaintiff's claims for double damages can be drawn from them. When the facts and circumstances from which that conclusion must be deduced, if at all, are examined, all that can be said of them is that they are consistent with plaintiff's theory. But they are also equally consistent with the other theory, viz., that the place of entrance was at the street-crossing. How, then, can it be said that plaintiff's theory is proven? The finding of the jury, we think, lacks the support of evidence. The question as to the place of entrance, under the evidence, was matter of mere conjecture, and on that state of facts plaintiff was clearly not entitled to recover double the value of the property. But it was contended that, under the statute (Code, § 1289), it was necessary only for plaintiff to prove the injury to his property, and that when that fact was proven the burden was on defendant to prove that the injury was not occasioned by the want of a sufficient fence; but we cannot go into that question. The district court took the opposite view, and in-

Finding not supported by evidence.

structed that the burden on that question was on plaintiff, and, that view being favorable to defendant, its appeal does not bring the question here for review. The exception taken to the instruction is not that it does not correctly express the law, but that, assuming its correctness, the evidence presented no question for the jury. It is therefore not reviewable on this appeal. But the only question presented in that connection is whether, assuming that it is correct, the verdict can be sustained, and we think it cannot.

2. The only other question in the case is whether defendant was bound to maintain a fence on the north line of its yard. The district court submitted that question to the jury, to be determined by them as one of fact. We think that was correct. The opening was made for the accommodation of a single shipper. Ordinarily, goods were received and delivered at another yard, or, more properly, at another place in the same yard, but outside of the inclosure. At a time when the streets were in bad condition it was more convenient for that particular shipper, whose place of business was immediately north of the inclosed yard, to receive his goods within the inclosure; and the opening was made for that purpose. The law is that "railroads are required to be fenced when it is fit, proper, and suitable in view of the public convenience, and depot grounds may be uninclosed when the interest of the road and public require it." Latty *v.* Railway Co., 38 Iowa, 250. But whether the public convenience and the interest of the road required that the grounds in question, which, as we have seen, were not the ordinary place for receiving and delivering freight, should be left uninclosed, was a question of fact, and was properly left to the jury. Reversed.

Whether company was bound to fence.

BECK, J. (*dissenting*).—In my opinion, there is no such absence, of evidence to support the finding of the jury as to require this court to reverse the judgment. The fact cannot be doubted that plaintiff's horses were upon the railroad track. Conceding the position of the opinion that the measure of plaintiff's damages is determined by the fact whether the animals went upon the track in one place or another, I think it cannot be said that there was no evidence upon which the jury may have found the fact as they did find it. The place of the entrance of the animals is an incidental matter, a circumstance which may be inferred from the other circumstances and facts in the case. I do not think there was an entire absence of circumstances to support the inference drawn by the jury. In my opinion, the judgment of the district court ought to be affirmed.

Where Fences Must Be Constructed.—See note, 31 Am. & Eng. R. R. Cas., 502, 503, where cases are collected. See also 7 Am. & Eng. Encyc. of Law, tit. "FENCES" II, 2, (*d*); viii. 2.

As to Duty of Company to Fence, see, *ante,* Payne *v.* Kansas City, St. J. & C. B. Co., 113 and note 117-119; *post,* Johnson *v.* Chicago & N. W. R. Co., and note; Wilder *v.* Chicago & W. M. R. Co., and note; Rinear *v.* Grand Rapids & I. R. Co.

Regarding Sufficiency of Fence.—See 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II, 2, (*d*); vii.

Killing Stock—Evidence.—See, *ante,* Union Pacific R. Co. *v.* Blum, 119, note 121.

EMMONS

v.

MINNEAPOLIS AND ST. L. R. CO.

(*Supreme Court of Minnesota, February* 14, 1888.)

Fence — Failure to Construct — Damages to Land — Measure.— For the neglect of a railroad company to fence its track as required by statute, the landowner over whose farm the same is laid may recover, as damages, diminution of the rental value of the farm caused thereby. Such damages are not necessarily limited to what it would cost to build a fence.

APPEAL from District Court, Freeborn County.

Action to recover damages for the failure of the defendant to construct fences along its track, as required by law.

Lovely & Morgan for appellant.

B. S. Lewis for respondent.

DICKINSON, J.—In 1879, the defendant acquired from the plaintiff, by purchase, the right of way for its railroad across the plaintiff's farm, and has ever since operated its railroad over the same. During this period the farm has been fenced, except along the railroad, where no fence has been built. In this action the plaintiff, who has been in the occupation of his farm, cultivating the same and raising stock, seeks to recover damages for the neglect of the defendant to construct fences, as by statute it was required to do. Upon a former appeal in this action, involving the sufficiency of the complaint, we had occasion to consider whether for such a cause the plaintiff could recover the injury alleged in the complaint, being a diminution of the value of the use of the farm, the deprivation of its use, and the expenditure of time and money in watching stock to protect it from injury. It was then decided (Emmons *v.* Railway Co., 35 Minn. 503) that damages were recoverable, and that the liability of the defendant was not limited to making compensation for animals

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killed or injured by reason of such neglect. The measure of damages recoverable was not determined. Many of the points urged in behalf of the railway company upon this appeal were necessarily involved in the former case, and were determined by that decision. We do not, therefore, refer to them particularly. The question is now presented whether the diminution of the rental value of the farm from this cause is a proper measure of damages; and, further, whether such damages must be limited to what would be the cost of constructing a fence. The court below ruled that this was a proper measure of damages, but that the recovery should be thus limited. Both parties appealed.

We consider that this measure of damages—not now referring to the limitation—was proper. This is a logical conclusion from the former decision, in view of the reasoning upon which it was based. See also Brakken *v.* Railway Co., 29 Minn. 41; s. c., 7 Am. & Eng. R. R. Cas. 593. It is, true that if the occupant's stock were killed because of the defendant's neglect to construct a fence, he might recover their value; but it cannot be said that this rule subjects the company to double damages for the same cause of action. The fact that the company is liable for stock killed will of course enter into and affect the rental value. That value will not be as much depreciated by the unfenced condition of the farm as it would be if there were no such liability. But it cannot be laid down as a legal proposition that the recovery must be limited to what it would cost to construct a fence. The principle that one should not neglect to take reasonable precautions to lessen or avert the injurious consequences to which the culpable act of another may have exposed him cannot be applied so as to make it the duty of the landowner to himself construct the fence. The statute absolutely imposes that duty upon the railroad company, and declares its responsibility in case of neglect. This being so, it is inconsistent to say that upon default of the company it becomes in any sense the duty of the landowner towards the company to construct a fence in its stead. But, again, when can it be said that the landowner ought to construct the fence? Is he to assume that the railroad company will continually neglect to do what the statute continually requires it to do? and, so, must he construct the fence at once? So long, at least, as he is justified in waiting for the company to do its duty, he may suffer damage from being prevented from using his land, or in the loss of its rental value; and, if he were to build a fence, this loss would be a proper subject of recovery, in addition to the proper cost of the fence. But, for the reason first stated, we think the ruling of the court was unsustainable. We are not referring to a mere defect

Damages for failure to construct fence.

arising from inadvertence or want of knowledge, but of a case where the company wilfully neglects to heed the command of the law. For the reasons thus indicated, the order refusing a new trial is reversed.

Failure to Fence—Damages.—See, *post*, Memphis & C. R. Co. *v.* Hembree, 128 and note 130.

For a full disscussion of the subject of damages in case of failure of a railway company to fence its road, see 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II, 2, (*d*); viii., 3, (*b*).

MEMPHIS AND CHARLESTON R. CO. *et al*

v.

HEMBREE.

(*Alabama Supreme Court, May* 28, 1888.)

Killing Stock—Secondary Evidence—Documents in Another State.—In an action to recover damages for the killing of stock, if a claim made by the plaintiff be in possession of a person residing in another State or jurisdiction, and not in any way under the control of the party wishing to introduce it, secondary evidence may be admitted to prove the contents thereof, without giving preliminary notice to produce them.

Same—Measure of Damages.—If an ox is killed by a railroad company, and the owner is informed of the accident in such time that he could by reasonable diligence have used the hide or the meat for beef, the value of the hide and of the meat should, in assessing damages against the railroad company, be deducted from the value of the ox when killed.

APPEAL from Circuit Court from Jackson County.

Action by A. J. Hembree against Memphis & Charleston and East Tennessee, Virginia & Georgia R. Cos., to recover damages for the killing of an ox belonging to the plaintiff. The testimony showed that at the time of the accident the plaintiff was away from home, but returned on the evening of the same day. The ox had been skinned and the hide placed in a house belonging to plaintiff. It was also shown that some of the flesh had been used as meat. The plaintiff did not order the ox to be skinned. It appeared from the evidence that if the ox had been properly butchered $25 might have been realized, but that plaintiff did not take off the meat so used, nor was he paid for any of it. Shortly after the accident plaintiff made out a claim under oath which he presented to the agent of the Nashville, Chattanooga & St. Louis R. Co., the claim placed the value of the ox about $40 or $45, it was made out on one of the

blanks of the Nashville, Chattanooga & St. Louis R. Co. in Nashville, Tennessee, but was framed against the defendants. One of defendants' witnesses testified that he had seen the claim, that it was now in the possession of the "law and stock agent" of the Nashville, Chattanooga & St. Louis R. Co. in Nashville, Tennessee; that he tried to obtain the claim from the agent but was unable to do so. Upon his offer to testify as to the contents of the claim, the plaintiff objected that such secondary evidence was inadmissible, because the claim was itself the best evidence, and defendants had not laid sufficient foundation for the introduction of secondary evidence. The court having sustained plaintiff's objection, the defendants excepted. The defendants requested the court to charge the jury as follows: (2) "If the jury find that the plaintiff was informed of the accident on the evening of the day when it occurred, and could by reasonable diligence have used the hide, or the meat for beef, and did receive the hide, then the value of the hide, and of the meat that was or could have been used, should, in assessing the damages, be deducted from the value of the ox when killed." (3) "If the jury find from the evidence that the animal killed was worth a certain sum, and was plaintiff's property after it was killed, and the hide was taken from said animal, and was in the house belonging to plaintiff, or under his control, and that the hide was worth several dollars, and could have been sold by plaintiff if he had desired to do so, or that he could have used or disposed of said hide, or of a part of said ox as meat, then the value of the hide and of the meat, or either, must be deducted from the value of the ox when it was killed."

Humes, Walker, Sheffey & Gordon for appellant.

Brown & Kirk for appellee.

SOMERVILLE, J.—1. It is an established rule, many times reiterated by this court, that, if any documents or papers which are necessary as evidence in a court in one State be in possession of a person residing in another State or jurisdiction, secondary evidence may be admitted to prove the contents of such documents or papers, without giving any preliminary notice to produce them. Young *v.* Railway Co., 80 Ala. 100; Martin *v.* Brown, 75 Ala. 442; Gordon *v.* Tweedy, 74 Ala. 236; Steph. Dig. Ev. (Reyn. Ed.) art. 71; Burton *v.* Driggs, 20 Wall. 125. The court, under this principle, erred in refusing to permit the defendant to prove by the witness White the contents of the written claim which the plaintiff had filed with McGaughey for the alleged killing of the ox. The paper was shown to be in the possession of a person in another State, and not to be, in any manner, subject to the control of defendant.

Evidence—Documents in another State.

2. Under the rule for the measure of damages laid down by us in Railroad Co. *v.* Fullerton, 79 Ala. 298, in cases where cattle, or stock of any kind, are killed by railroad companies, the circuit court erred in refusing to give the second charge requested by the defendant. The third charge requested was faulty only in not permitting any inquiry by the jury as to the question of reasonable diligence being exercised on the plaintiff's part in utilizing for his own benefit the hide and carcass of the animal killed.

Measure of damages.

3. The motion to dismiss the case for want of jurisdiction was properly overruled; the amount claimed by the plaintiff in his complaint, and the amount recovered by the judgment, each being as much as $60. Morris *v.* Robinson, 80 Ala. 291; Haws *v.* Morgan, 59 Ala. 508; Mills *v.* Long, 58 Ala. 458; King *v.* Parmer, 34 Ala. 416; Code 1886, § 2739; Const. 1875, art. 6, § 5; Code, § 756. The judgment is reversed, and the cause remanded.

Jurisdiction.

Killing Stock—Evidence.—As to evidence in case where stock is injured by a railway, see, *ante*, Union Pacific R. Co. *v.* Blum, 119, and note 121.

Same—Measure of Damages.—In those cases where stock is killed outright, the plaintiff is entitled to recover damages for the value of the stock at the time of the injury. The rule is the same where the animal is so seriously injured that it has to be killed. See Toledo, P. & W. R. Co. *v.* Johnston, 74 Ill. 83; Toledo P. & W. R. Co. *v.* Arnold, 43 Ill. 418; Indianapolis & M. R. Co. *v.* Mustard, 35 Ind. 173; Madison and I. P. R. Co. *v.* Herod, 10 Ind. 2; Lapine *v.* New Orleans, O. & G. W. R. Co., 20 La. An. 158.

Value of Animal after Injury.—While it is true that a man whose stock has been wrongfully injured cannot be required to take the dead animal in part pay for a living one (Ohio & M. R. Co. *v.* Hays, 35 Ind. 173; Indianapolis, P. & C. R. Co. *v.* Mustard, 34 Ind. 51), yet in those cases where the animal is killed outright, and the carcass is fit for beef, it is the duty of the owner to dispose of it to the best advantage. In such case the measure of damages will be the difference between the value of the cattle when alive and that of the beef. Illinois C. R. Co. *v.* Finnigan, 21 Ill. 646; Roberts *v.* Richmond & D. R. Co., 88 N. C. 560. In such case, however, the owner is only to be charged with the net proceeds of such cattle after deducting a fair allowance for the time and trouble required in effecting a sale. Dean *v.* Chicago & N. W. R. Co., 43 Wis. 305.

Where the owner of cattle, which have been killed by a railroad, uses or gives the carcasses away, the value of such carcasses will be deducted from the damages. Case *v.* St. Louis & S. F. R. Co., 65 Mo. 668; s. c., 13 Am. & Eng. R. R. Cas. 564.

For a full discussion of the topic of damages for animals negligently killed by railway, and as to measure of damages, see, *ante*, Emmons *v.* Minneapolis & St. L. R. Co., 126, and note 128. See 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II, 2, (*d*); viii, 3, (*b*).

JOHNSON

v.

CHICAGO AND NORTH WESTERN R. CO.

(*Iowa Supreme Court, September* 8, 1888.)

Stock Running at Large—Depot Grounds—Construction of Statute.—A horse driven across the depot grounds is not "running at large" within the meaning of the statute, which gives the right of recovery against a railroad company for stock killed while "running at large," at a point upon the railroad track where the right to fence exists, and which declares that "the operating of trains upon depot grounds, necessarily used by the company and public, where no fence is built, at a greater rate of speed than eight miles an hour shall be deemed negligence, and render the company liable under this section," and no recovery can be had, although the train which killed the horse was travelling at a greater rate than eight miles an hour, the operation of the statute being confined to stock running at large.

APPEAL from District Court, Webster County,

Action to recover damages for injury to a horse and wagon by one of the defendant's trains, when being driven by plaintiff across the depot grounds of the defendant company. The plaintiff appeals from a verdict for the defendant, rendered by the jury under direction of the court.

Wright & Farrell for appellant.

J. C. Cook for appellee.

SEEVERS, C.J.—The only ground of negligence stated in the petition is that defendant's train which caused the injury was being operated and run at a rate of speed exceeding eight miles an hour. It is provided by statute that any "corporation operating a railroad that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of any stock injured or killed by reason of such want of fence, for the value of the property or damage caused, unless the same was caused by the willful act of the owner or his agent; and in order to recover it shall only be necessary for the owner to prove the injury or destruction of his property: . . . provided, . . . the operating of trains upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles an hour, shall be deemed negligence, and render the company liable, under this section." Code, § 1289. As the horse killed was not running at large, the mate-

Horse not killed while running at large.

rial inquiry is whether the plaintiff was entitled to recover under this section. This inquiry must be answered in the negative. It seems to us it is not possible to construe the statute otherwise. This is what the statute plainly says. The only liability under it is for stock injured or killed which is running at large. Monahan *v.* Railroad Co., 45 Iowa, 523. As this view is in accord with the ruling of the district court, the result is that the judgment must be affirmed.

Duty to Fence.—Regarding duty of railway companies to fence, see, *ante*, Payne *v.* Kansas City, St. J. & C. B. R. Co., 113, and note, 117–119.

In the absence of a special agreement or statutory provision binding a company to fence its track, it is no more under obligation to fence its property than any other land-owner. See Vandergrift *v.* Delaware R. Co., 2 Houst. (Del.) 287; Pittsburgh, C. & St. L. R. Co. *v.* Stuart, 71 Ind. 500; Indianapolis & C. R. Co. *v.* Caldwell, 9 Ind. 397; La Fayette & L. R. Co. *v.* Shriner, 6 Ind. 141; Sherman *v.* Anderson, 27 Kan. 333; Union Pacific R. Co. *v.* Rollins, 5 Kan. 168; Annapolis & E. R. Co. *v.* Baldwin, 60 Md. 88; s. c., 11 Am. & Eng. R. R. Cas. 486; Keech *v.* Balt. & W. R. Co., 17 Md. 33; Balt. & O. R. Co. *v.* Lamborn, 12 Md. 257; Wilder *v.* Maine C. R. Co., 65 Me. 332; Perkins *v.* Eastern R. Co., 29 Me. 307; Towne *v.* Nashua & L. R. Co., 124 Mass. 101; McDonell *v.* Pittsfield & N. A. R. Co., 115 Mass. 564; Maynard *v.* Boston & M. R. Co., 115 Mass. 458; Stearns *v.* Old Colony & F. R. Co., 83 Mass. (1 Allen) 493; Grand Rapids & I. R. Co. *v.* Monroe, 47 Mich. 152; Williams *v.* Michigan Cent. R. Co., 2 Mich. 260; Fitzgerald *v.* St. Paul, M. & M. R. Co., 29 Minn. 336; s. c., 8 Am. & Eng. R. R. Cas. 310; Witherell *v.* Milwaukee & St. P. R. Co., 24 Minn. 410; Locke *v.* St. Paul & P. R. Co., 15 Minn. 350; Cressey *v.* Northern R. Co., 59 N. H. 564; Towns *v.* Cheshire R. Co., 21 N. H. 363; Cornwall *v.* Sullivan R. Co., 28 N. H. 161; Price *v.* New Jersey R. & T. Co., 31 N. J. L. (2 Vr.) 229; Vandegrift *v.* Rediker, 22 N. J. L. (2 Zab.) 185; Spinner *v.* New York C. & H. R. R. Co., 67 N. Y. 153; Munger *v.* Tonawanda R. Co., 4 N. Y. 349; affirming 5 Den. (N. Y.) 255; Terry *v.* New York Cent. R. Co., 22 Barb. (N. Y.) 574; Tower *v.* Providence & W. R. Co., 2 R. I. 404; Congdon *v.* Central Vt. R. Co., 56 Vt. 390; s. c., 48 Am. Rep. 793; Hurd *v.* Rutland & B. R. Co., 25 Vt. 116; Trow *v.* Vermont C. R. Co., 24 Vt. 487; Veerhusen *v.* Chicago & N. W. R. Co., 53 Wis. 689; Galpin *v.* Chicago & N. W. R. Co., 19 Wis. 604; Stucke *v.* Milwaukee & Miss. R. Co., 9 Wis. 203; Wiseman *v.* Booker, L. R., 3 C. P. Div. 184; Dawson *v.* Midland R. Co., L. R. 8 Ex. 8; Buxton *v.* North-Eastern R. Co., L. R. 3 Q. B. 549; s. c., 37 L. J. Q. B. 258; 18 L. T. 795; Manchester, S. & L. R. Co. *v.* Wallis, 14 C. B. 213; Rickets *v.* East India Docks & B. J. R. Co., 12 C. B. 160; Fawcett *v.* York & N. M. R. Co., 16 Q. B. 610. In those States, however, where the common law rule is not enforced, a railroad company is bound to ordinary care and skill in the management of its train to prevent injury to cattle on its uninclosed track, whether they be there rightfully or not, and is liable for damages resulting from its want of such care, skill, and diligence, and for nothing more in the absence of a law requiring it to fence its track. Little Rock & F. S. R. Co. *v.* Finley, 37 Ark. 562; Isbell *v.* New York & N. H. R. Co., 27 Conn. 393; Georgia R. Co. *v.* Neely, 56 Ga. 540; Macon & W. R. Co. *v.* Lester, 30 Ga. 911; Macon & W. R. Co. *v.* Davis, 13 Ga. 68; Rockford R. I. & St. L. R. Co. *v.* Rafferty, 73 Ill. 58; Toledo, W. & W. R. Co. *v.* Barlow, 71 Ill. 640; Toledo, P. & W. R. Co. *v.* Ingraham, 58 Ill. 120; Rockford, R. I. & St. L. R. Co. *v.* Lewis, 58 Ill. 49; Toledo, P. & W. R. Co. *v.* Bray, 57 Ill. 514; Illinois

C. R. Co. *v.* Baker, 47 Ill. 295; Chicago & N. W. R. Co. *v.* Taylor, 8 Ill. App. 108; Baltimore & O. R. Co. *v.* Mulligan, 45 Md. 486; Searles *v.* Milwaukee & St. P. R. Co., 35 Iowa, 490; Balcom *v.* Dubuque & S. C. R. Co., 21 Iowa, 102; Whiterell *v.* Milwaukee & St. P. R. Co., 24 Minn. 410; Locke *v.* First Div. St. P. & P. R. Co., 15 Minn. 350; New Orleans, J. & G. N. R. Co. *v.* Field, 46 Miss. 573; Raiford *v.* Mississippi C. R. Co., 43 Miss. 233; Vicksburg & J. R. Co. *v.* Patton, 31 Miss. 156; Mississippi C. R. Co. *v.* Miller, 40 Miss. 45; Gorman *v.* Pacific R. Co., 26 Mo. 441; Laws *v.* North Carolina R. Co., 7 Jones (N. C.), L. 468; Cincinnati & Z. R. Co. *v.* Smith, 22 Ohio St. 227; Cleveland C. C. R. Co. *v.* Elliott, 4 Ohio St. 474; Kerwhaker *v.* Cleveland, C. & C. R. Co., 3 Ohio St. 172; Bemis *v.* Connecticut & P. R. R. Co., 42 Vt. 375; Morse *v.* Rutland & B. R. Co., 27 Vt. 49; Jackson *v.* Rutland & B. R. Co., 25 Vt. 150; Trow *v.* Vermont G. R. Co., 24 Vt. 487; Trout *v.* Virginia & Tenn. R. Co., 23 Gratt. (Va.) 619; Washington *v.* Baltimore & O. R. Co., 17 W. Va. 190; Baylor *v.* Baltimore & O. R. Co., 9 W. Va. 270; Blaine *v.* Chesapeake & O. R. Co., 9 W. Va., 252. See, as to the common law and statutory liability of the railroad companies to fence, 7 Am. & Eng. Encycl. of L., tit. "Fences," II., 2 (*a*) and (*b*).

Same—Depot Grounds.—Railroad companies are not required to fence their track at stations and sidings where freight or passengers are received or discharged, and where public convenience requires that they should not be fenced. Where cattle wander upon the track at such a place, and are injured or killed, the company will not be liable except in those cases where its servants have been guilty of negligence. See Peoria P. & J. R. Co. *v.* Barton, 80 Ill. 72; Illinois C. R. Co. *v.* Bull, 72 Ill. 537; Great Western R. Co. *v.* Bacon, 30 Ill. 347; Wabash, St. L. & P. R. Co. *v.* Tretts, 96 Ind. 450; s. c., 19 Am. & Eng. R. R. Cas. 601; Davis *v.* Louisville, N. A. & C. R. Co. *v.* Harrigan, 94 Ind. 245; s. c., 19 Am. & Eng. R. R. Cas. 598; Louisville, N. A. & C. R. Co. *v.* Hall, 93 Ind. 245; s. c., 19 Am. & Eng. R. R. Cas. 597; Louisville, N. A. & C. R. Co. *v.* Quade, 91 Ind. 295; s. c., 19 Am. & Eng. R. R. Cas. 595; Cincinnati, R. & Ft. W. R. Co. *v.* Wood, 82 Ind. 593; Jefferson, M. & I. R. Co. *v.* Lyon, 72 Ind. 107; s. c., 2 Am. & Eng. R. R. Cas. 648; Indianapolis, P. & C. R. Co. *v.* Crandall, 58 Ind. 365; Ohio & M. R. Co. *v.* Rowland, 50 Ind. 347; Pittsburgh, C. & St. L. R. Co. *v.* Bowyer, 45 Ind. 496; Indianapolis St. L. R. Co. *v.* Christie, 43 Ind. 143; Jefferson, M. & I. R. Co. *v.* Huber, 42 Ind. 173; Jeffersonville, M. & I. R. Co. *v.* Beatty, 36 Ind. 15; Indianapolis, C. & L. R. Co. *v.* Warner, 35 Ind. 515; Indianapolis & C. R. Co. *v.* Oestel, 20 Ind. 231; Beckdolt *v.* Grand Rapids & I. R. Co., 113 Ind. 343; s. c., 15 N. E. Rep. 686; Schneir *v.* Chicago, R. I. & P. R. Co., 40 Iowa, 337; Smith *v.* Chicago, R. I. & P. R. Co., 34 Iowa, 506; Davis *v.* Burlington & M. R. Co., 26 Iowa, 549; Chicago & G. T. R. Co. *v.* Campbell, 47 Mich. 265; s. c., 7 Am. & Eng. R. R. Cas. 545; Asher *v.* St. Louis, I. M. & S. R. Co., 79 Mo. 432; s. c., 19 Am. & Eng. R. R. Cas. 593; Young *v.* Hannibal & St. J. R. Co., 79 Mo. 336; s. c., 19 Am. & Eng. R. R. Cas. 512; Nance *v.* St. Louis, I. M. & S. R. Co., 79 Mo. 196; s. c., 19 Am. & Eng. R. R. Cas. 594; Wallace *v.* St. Louis, I. M. & S. R. Co., 74 Mo. 594; Snider *v.* St. Louis, I. M. & S. R. Co., 73 Mo. 465; s. c., 7 Am. & Eng. R. R. Cas. 558; Wier *v.* St. Louis & I. M. R. Co., 48 Mo. 558. See also 7 Am. & Eng. Encycl. of L., tit. "FENCES," II, 2 (d); viii., 1, (*a*).

As to duty to fence depot grounds, see, *post*, Wilder *v.* Chicago & W. M. R. Co.; Rinear *v.* Grand Rapids & I. R. Co.; Beckdolt *v.* Grand Rapids & I. R. Co.; Peters *v.* Stewart.

Same—Stock Running at Large—Construction of Statute.—In Grove *v.* Burlington, Cedar Rapids & Northern P. Co. (Iowa), 39 N. W. Rep. 248, the court held, that a team of horses harnessed to a sleigh, and wandering about

on the prairie at night, the driver of which was in an unconscious drunken stupor, is not live-stock "running at large" within the meaning of the Iowa Code, and the owner cannot recover damages for the killing thereof, by a train at a point upon the railroad where the company has the right to fence. The court say: "The statute provides that for a failure to fence a railroad the corporation operating the same shall be liable for damages done to "live-stock running at large." Code, § 1289. The defendant moved the court to instruct the jury to return a verdict for the defendant, and the motion was sustained on the ground that the team was not running at large within the meaning of the statute. The question presented by the appeal is whether this ruling was correct. Counsel for appellant cites us to Hinman *v.* Railway Co., 28 Iowa, 494, and other cases determined by this court, and claims that, under the rule of the cited cases, the question as to whether the team was running at large should have been submitted to the jury. We do not think any of the cases relied upon sustain the claim of plaintiff. In all of them the animals were without a driver, and not under the control of any one. In the case at bar there was a driver in the sleigh. Plaintiff, in effect, contends that he was not a driver, because he was so drunk that that he was insensible. We are, in effect, asked to hold that it is proper to consider the capacity of the driver in determining the question of whether the team was running at large. The law will not allow parties to enter upon any such an investigation. If it did, recovery might be had where a driver was incapacitated from controlling his team from any physical cause. Intoxication is punished as a crime in this State, and by the plaintiff's own showing the driver of his team voluntarily became drunk, and the drunkenness was the cause of the injury. We think the ruling of the district court was correct."

In Valleau *v.* Chicago, M. & S. P. R. Co., 36 N. W. Rep. 76, the Iowa court in construing the same statute held that, a steer, which forms one of the herd of 80 cattle, is to be deemed "running at large" within the meaning of the statute, when it appears that the cattle herder has just taken the place of another herder, who has been absent for some time, and without noticing the steer in question, which had separated from the rest, drives the cattle hurriedly across the railroad track to avoid an approaching train, leaving the steer in question behind. The court said: "In Hinman *v.* Railroad Co., 28 Iowa, 491, it is said that the words "running at large," as used in the statute, "import that the stock are not under the control of the owner; that they are not confined by inclosures to a certain field or place, nor under the immediate care of a shepherd or herdsman; that they are left to roam wherever they may go;" and in Smith *v.* Railroad Co., 58 Iowa, 622, it was held that a sucking colt, the dam of the colt being under the control of the owner, was running at large, although ordinarily it might be expected to follow its dam. In the case at bar it does not appear how long the herdsman in charge of the cattle had left there before another person took charge of them. As error must affirmatively appear, it can be fairly said that the cattle were in charge of no person for at least some indefinite period of time. During such time they were running at large, and the steer in question had strayed some distance from the herd, when a person took charge of the cattle except the one in question, which he did not know had separated from the rest of the cattle. The steer in question was not in the "immediate" charge of a herdsman, but was running at large as provided in the statute.

MOLAIR

v.

PORT ROYAL AND AUGUSTA R. CO.

(*South Carolina Supreme Court, July* 13, 1888.)

Killing Stock—Negligence—Degree of Care.—If stock are observed upon a railroad track by the employees in charge of a train, the degree of care demanded from them is that care which prudent men, influenced by personal interest, ordinarily bestow on their business and conduct, and not such a degree as would have prevented an injury to the stock except the accident were inevitable under any circumstances.

Same—Stock Law—Evidence of Adoption.—In an action to recover damages for the killing of stock, although the stock killed were not running at large, evidence that the stock law had been adopted by the county in which the accident occurred is admissible for the purpose of showing that the company's employees are not reasonably called upon to exercise the same degree of vigilance which would be demanded of them in a county where no prohibition existed against stock running at large.

Same—Evidence—Competency.—In such an action, if it appear that the stock were killed on a culvert, the cross-ties of which were afterwards found to have been pushed together, the jury cannot consider the condition of the culvert before the accident, in the absence of any evidence thereon.

APPEAL from Common Pleas Circuit Court, Barnwell County.

Action by Leroy Molair against the Port Royal & Augusta R. Co., to recover damages for the killing of certain mules belonging to the plaintiff. Defendant appeals from verdict and judgment for plaintiff. The case is stated in the opinion.

Elliott & Howe for appellant.

Robert Aldrich for respondent.

MCIVER, J.—The action in this case was for the recovery of damages sustained by the plaintiff by reason of the alleged negligent killing of two of his mules by defendant's train. Negligence on the part of the defendant being the gist of the action, that fact is alleged in the complaint, and denied in the answer, and that was really the only issue in the case, the fact that the animals were killed by the train being conceded. The testimony on the part of the plaintiff tended to show that the mules were hired by the plaintiff, to Dr. Kirkland, to take him to Allendale; and that, when he reached Brunson, which seems to be a station on defendant's road, he stopped for the night, and the mules were "securely stabled" near the railroad track. During the night, from some

Facts.

cause not explained by the testimony, the mules broke out of the stable and ran down the railroad track to a culvert about a mile and a quarter below Brunson, where they were found next morning dead, with their bodies mangled. "The cross-ties in the culvert were pushed up together." Another witness for plaintiff, who traced the tracks of the mules, said: "The mules appeared to have been running rapidly from the time they left the stable;" and he also stated that "the cross-ties of the track, for several feet on the side next to Brunson, were crowded together." A third witness testified that the mules broke out of the stable when the train came up to the tank to take water; and, after they broke out, he took a lantern, the night being dark and rainy, and followed the tracks, and "found the mules at the culvert," both dead. The conductor and engineer of the train were examined on behalf of defendant, the former testifying that "it was a dark, foggy night," and the train, which was a freight train, was running in accordance with the rules of the road." The engineer said: "The grade at Brunson from the tank to the culvert is a down grade. I had a train of 18 cars on the night the mules were killed. Four of them were loaded. The night was dark and foggy. . . . When we got nearly to the culvert, I saw two animals in the culvert. I immediately reversed my engine and gave her steam. I did not have time to blow the whistle before the mules were killed. My engine was in good order, and I did everything in my power to avoid killing the mules, but could not do so. I was keeping a good lookout; but on a night like that it is impossible to see farther than 20 to 30 yards ahead of you. I could not have stopped my train on that grade within a quarter of a mile if I was running at the schedule rate of speed; that is, a train such as I was then running. When I saw the mules, they were on the culvert. . . . It was dangerous to strike the mules, for it might have thrown the train from the track. I would have avoided the risk on my own account, if I could have done so. Everything was done, to avoid killing the mules, which could be done." The circuit judge, in his charge to the jury, which seems to be set out in full in the case, and, in justice to all parties concerned, should be incorporated in the report of this case, after stating in general terms the large privileges conferred upon corporations of this character by the legislature, said: "In return for this, they are expected to perform all the duties required by their charters, and they are expected to use such care and diligence in the performance of those duties that neither society nor individuals can be injured; so that the question, and perhaps the only question, in this case which you have to decide is this: Was this an unavoidable accident? Was the killing of those mules by that railroad train an unavoidable acci-

dent? Could any care and diligence have prevented the loss which Mr. Molair has sustained? . . . The train came up there at its appointed time. The mules had been securely stabled, and, for some reason not explained, whether it was the noise of the train or something else, they broke out of the stable and took their way on the road. They then ran down that railroad track. The engine and train ran upon them, and they were killed. Now, was this an unavoidable accident? Could ordinary care and diligence, or extraordinary care and diligence, have prevented this accident? I don't think the stock law has anything to do with it. It is true, the stock law is in force in this county. That law was intended to keep cattle and stock within the pastures. These mules were not turned out. They were in a stable, as you are informed, securely fastened; but, for some reason, not explained, they got out. Well, now, taking down that railroad on a down grade, with a heavy freight train behind it, could the engineer, by ordinary care and diligence,—not ordinary, but by care and diligence,—have prevented running upon these mules? When they came to the culvert, they were overtaken, it would seem, by the train, and were mangled and killed. Was that culvert in good order? This is another question, which you will have to ask yourselves. There is no proof about it one way nor [or] the other, but it is one of the elements which you will have to consider in coming to your conclusion as to care and diligence." Then, at the conclusion of the charge, the jury were told: "The only question for you to decide is: Could the killing of these mules have been prevented by care and diligence? Was it an unavoidable accident?" Under this charge the jury found a verdict for the plaintiff, and the defendant appealed upon the several grounds set out in the record.

It seems to us that there was error on the part of the circuit judge in laying down the rule as to the degree of negligence which would render the defendant liable in a case of this kind. In Simkins *v.* Railroad Co., 20 S. Car. 258; s. c., 19 Am. & Eng. R. R. Cas. 467, the chief justice, in considering this subject, after saying that negligence was the absence of care, and adverting to the different degrees of care which may be exercised in the several classes of cases mentioned, says: "Now, there are but few cases where that minute and scrupulous attention referred to above in the first class is required by the law, and consequently but few cases where slight negligence can be made the foundation of an action for damages. All that the law requires, as a general rule, is that sort of care which prudent men, influenced by personal interest, ordinarily bestow on their business and conduct; and it is the absence of this kind of care which in most

Degree of care required to avoid killing stock.

cases gives rise to actions at law." This, we think, is a correct statement of the rule as to the degree of care required of the defendant in cases like that now under consideration. The defendant is not held to the highest possible degree of care, but only ordinary care; that is, such as prudent persons usually exercise in the management of their private affairs. Hence, it is the absence of that degree of care which constitutes such negligence as will render the defendant liable. This being the rule, our next inquiry is whether the circuit judge has gone beyond it in his charge to the jury. It seems to us clear that he has. When he said to the jury that the only question for them to decide was whether the killing of the mules was an unavoidable accident, such language necessarily implied that, if the disaster could have been avoided by any possible degree of care on the part of the defendant, then the company was liable; and this was made more manifest by the phraseology which he adopted in again stating the question,—"Could any care and diligence have prevented the loss which Mr. Molair sustained?" The jury could not well understand such language to mean anything else but this: that the defendant was liable unless the accident unavoidable; that is, could not have been avoided by the utmost possible degree of care, or unless the plaintiff's loss could not have been prevented by the exercise of any amount of care and diligence.

It is contended, however, that this instruction to the jury was qualified and explained when, in a subsequent part of the charge, the judge used this language: "Now, was this an unavoidable accident? Could ordinary care and diligence, or extraordinary care and diligence, have prevented this accident?" And, again, when he said to the jury: "Could the engineer, by ordinary care and diligence, not ordinary, but by care and diligence, have prevented running upon these mules?" It seems to us that this language must be regarded as either contradictory in its character, and as therefore tending to confuse and mislead the jury, or as rather strengthening, than qualifying, the previous part of the charge already commented on. If it is to be regarded as an instruction to the jury that the defendant was not bound to exercise anything more than ordinary care and diligence, then it is not only inconsistent with the first part of the charge, where the jury were told that the only question for them was whether the accident was unavoidable, or whether it could have been prevented by the exercise of any amount of care, but it is also inconsistent with what immediately follows: "Could the engineer, by ordinary care and diligence, not ordinary, but by care and diligence, have prevented running upon these mules?" Now, as we would not be willing to attribute to the circuit judge such inconsistent and conflicting instructions, we are bound to assume that,

in the language relied upon, he did not intend to qualify his previous instruction to the jury that the test of defendant's liability was whether the accident could have been avoided by the exercise of any degree of care, whether it was in fact absolutely unavoidable, but that his real meaning was that if the disaster could have been prevented either by the exercise of ordinary care and diligence, or by extraordinary care and diligence, then the defendant would be liable; and when he said the question was whether the engineer could, by ordinary care, have prevented the train from running over the mules, and immediately added the words. "not ordinary, but by care and diligence," he meant to say such care and diligence as he had previously indicated was necessary, and that the jury must not limit their inquiry to the question whether the accident could have been prevented by ordinary care, but must go on, and inquire whether it could have been prevented by such care and diligence as he had previously indicated was necessary. In this way alone can we reconcile the different portions of the charge which are apparently conflicting. And when we find that, in the conclusion of the charge, the judge states the only question for the jury in the same language as he used in the commencement of his charge, 'Was it an unavoidable accident?" we must conclude that we have placed the proper construction upon the charge.

Again, we think the circuit judge was in error in saying to the jury that the stock law had nothing to do with the case. While it is quite true that that law does not operate as a license to railroad companies to kill stock or cattle straying upon their tracks passing through uninclosed lands, and does not exempt them from liability for negligently killing such animals, yet, for the very good reason suggested in the case of Simkins, *supra*, it is an element to be taken into account in considering the question of negligence; for, as the chief justice well says in that case: "Negligence is a relative term, and its existence in a given case depends upon the requirements of the occasion." Hence he says: "In those counties in the State where the stock law has not become the law, and where cattle are at liberty to roam at large upon railroad tracks and elsewhere at will, for a train of cars to dash forward, without the precaution which should be observed in such cases, might be negligent; whereas, the same train, going at the same speed, and without the same precaution, in the counties where the stock law has been adopted, and where the railroad employees had no thought that cattle would be found on the track, would not be a negligent act." This is for the very obvious reason that, while prudent persons do not ordinarily take precautions against improbable or extraordinary contingencies, they do usually undertake to provide against probable or ordinary risks.

Evidence of adoption of stock law.

Hence, when a railroad train is being run through uninclosed lands, where the stock law prevails, inasmuch as the officers in charge of the train have no reason to suppose that cattle or stock will be found upon the track, they are not expected or required to take the same precautions, or to exercise the same degree of care, to avoid running over animals on the track as they would be when running through a county where the stock law does not prevail, and where they would have reason to expect to find cattle on the track. Of course, under the rule as laid down by the circuit judge as to the degree of care exacted of a railroad company in a case like the present, the stock law would not apply; for, if extraordinary care is required, and the highest possible dilligence is to be exacted, so that the company should be held liable unless the disaster was shown to be the result of an unavoidable accident, then the stock law would have no application to the case; and this furnishes an additional reason for supposing that the circuit judge did lay down the rule, as to the degree of care required, in the manner which we have hereinbefore indicated.

Evidence as to condition of culvert.

So, too, we think it was error to instruct the jury that there was another question for them to consider, "Was that culvert in good order?" when they were at the same time told, "There is no proof about it one way or the other," and when, so far as we can discover, there was not a particle of testimony as to the condition of the culvert prior to the accident. We do not see how the jury could properly consider a question as to which there was no testimony whatever.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and MCGOWAN, J., concur.

Degree of Care Required When Stock are Observed on Track.—See Missouri Pac. R. Co. *v.* Reynolds, 13 Am. & Eng. R. R. Cas. 510; Louisville, etc., R. Co. *v.* Ganote, 13 Ib. 519; Little Rock, etc., R. Co. *v.* Henson, 19 Ib. 440; Little Rock, etc., R. Co. *v.* Jones, 19 Ib. 443; Wilson *v.* Norfolk, etc., R. Co., 19 Ib. 453; Simkins *v.* Columbia, etc., R. Co., 19 Ib. 467; Little Rock, etc., R. Co. *v.* Holland, 19 Ib. 479; Chicago, etc., R. Co. *v.* Kendig, 19 Ib. 493; Memphis, etc., R. Co. *v.* Sanders, 19 Ib. 497; Alabama Gt. So. R. Co. *v.* Powers, 19 Ib. 502; Hannibal, etc., R. Co. *v.* Young, 19 Ib. 512; Kansas City, etc., R. Co. *v.* Lane, 22 Ib. 237.

Less Care Required After Passage of Stock Law.—Joyner *v.* South Car. R. Co., 28 Am. & Eng. R. R. Cas. 258.

Injury to Stock—Sufficiency of Evidence.—As to injury to stock and evidence, see, *ante*, Union Pac. R. Co. *v.* Blum, 119, and note, 121.

In Brockert *v.* Central Iowa R. Co. (Iowa), 39 N. W. Rep. 871, the plaintiff sued to recover double damages for the killing of a mare, which was found in a cattle-guard of defendant's road. She was lying partly on her back with her feet elevated, and was extricated with some difficulty and

afterwards died of the injuries she received. A train had passed about five o'clock in the morning, before the mare was found in the cattle-guard. There was no direct evidence tending to show that the mare was on or near the road when the train passed, that she was struck by the train or was frightened by it, or ran into the cattle-guard in her fright. The marks and injuries did not indicate that she was struck by the train. The cattle-guard was not sufficiently deep to allow the train to pass over her while in it without killing her outright or injuring her in parts which showed no injury. *Held*, that there was no evidence to justify a finding that the mare was killed by defendant's train, and a verdict for the plaintiff could not be sustained. In New Orleans & North Eastern R. Co. *v.* Jones (Miss.), 3 So. Rep. 653, the plaintiff sued to recover damages for the wrongful killing of a horse. There was no evidence that the horse was struck or injured by any train, and it was held that testimony which showed that horse tracks were found on the railroad track after the horse in question had been found injured in a ditch, where he had fallen from a bridge over a creek forty or fifty yards from the railroad track, was utterly insufficient to sustain a verdict for the plaintiff. In New Orleans & N. E. R. Co. *v.* Thornton (Miss.), 3 So. Rep. 654, the testimony showed that a horse was grazing by the side of the track when the train came along, that he ran along beside the train until he fell into some pits where he was injured. The court held that the railroad company was not answerable for the misfortune and a verdict for the plaintiff must be reversed. In the case of Asboch *v.* Chicago, B. & Q. R. Co., 37 N. W. Rep. 182, decided by the Supreme Court of Iowa, March 12, 1888, it is held that in an action under Code Iowa, § 1289, providing for the liability of a railroad for killing stock where its track is left unfenced, a showing that a horse which fell off of a bridge was seen lying dead by the bridge in the evening of a day near August 1st, not being seen there by a passer-by at 3 P. M. of that day; that on the evening of August 1st a train stopped near the bridge, and that the horse was exceedingly timid about a railway track; *held*, insufficient to show that the horse was driven onto the bridge by a train as an act of the defendant which, in connection with the want of a fence, was the cause of the injury.

DENNIS

v.

LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

(*Indiana Supreme Court, October* 11, 1888.)

Killing Stock—Contributory Negligence.—A person who places a horse in an inclosure securely fenced is not to be charged with contributory negligence because the horse leaps the fence and escapes upon the railroad track, unless it appears that the horse was one that ordinary fences would not confine.

Same—Animal on Track—Presumption.—If an animal is seen upon the track by a locomotive engineer there is no presumption that it will step from the track in time to avoid injury.

Same—Duty of Train Employees.—The employees in charge of a train are not under a duty to an owner to see animals wandering on a track securely protected, and although a horse escaped upon the track and was pursued by its owner who made signals to the train employees, the company is not liable for the killing of the horse, if the train employees did not see the animal, and it does not appear that the signals of the owner were clearly such as to give fair and full warning that injury would result if the train is not stopped.

APPEAL from Circuit Court, Jackson County.

Action to recover the value of a mare belonging to the plaintiff, which was killed by one of defendant's trains. The plaintiff appeals from a judgment for the defendant. The case is stated in the opinion.

Voyles & Morris for appellant.

George W. Friedly and *Alspaugh & Lawler* for appellee.

ELLIOTT, J.—The appellant owned a mare, which he kept in a securely fenced field adjoining the track of the appellee. The mare escaped from the field, and entered upon the appellee's track at a point where it was securely fenced. The appellant endeavored, without success, to catch her, and she was struck and killed by one of the appellee's trains. The mare ran in front of the approaching train, and was overtaken by it in a cattle-guard. The engineer and fireman of the appellee "might have seen the mare from the engine at the distance of one-quarter of a mile before the engine struck the mare; and when the train first came to a point where the mare could be seen by the engineer it was running at the rate of thirty-five or forty miles an hour." Signs and motions were made to the engineer and fireman by men in pursuit of the mare, which were seen by the fireman; but no attention was paid to them, nor was the bell rung or whistle sounded. About 200 yards from the cattle-guard the engineer shut off the steam and applied the brakes, checked the speed of the train, and brought it to a full stop after part of the train had passed the cattle-guard. The engineer might, by the exercise of ordinary prudence and care, have seen the mare, and stopped the train in time to prevent the accident, but he did not wilfully run upon the mare. The case comes before us upon a special finding, and from that finding we have extracted the material facts. It is now a firmly settled rule of practice that, if a finding is silent upon a material point, on that point it is against the party who has the burden. As the appellant had the burden, silence upon a material point is consequently fatal to him. We agree with counsel that the finding shows that there was no contributory negligence. A man who places a horse in an inclosure securely fenced is not to be charged with contributory negligence be-

Facts.

No contributory negligence shown.

cause the horse leaps the fence and escapes, unless it appears that the horse was one that ordinary fences would not confine. A land-owner is not guilty of contributory negligence if he maintains fences that are ordinarily and reasonably secure. Certainly a railroad company is not bound to make a fence that will keep every animal from its track; and what is not required of the railroad company cannot, in justice, be required of the land-owner. Railroad Co. *v.* Milligan, 52 Ind. 510.

We do not concur with appellee's counsel that the same rule applies to animals seen upon the track that governs where adult persons are seen upon it by the engineer. There can be no presumption that a horse or a cow will step from the track in time to avoid injury. For this reason the rule declared in Railroad Co. *v.* Hedges, 105 Ind. 398; s. c., 25 Am. & Eng. R. R. Cas. 550, and similar cases, does not apply to such a case as this. We cannot, therefore, yield to the contention of appellee's counsel upon this point. We are, however, of the opinion that the judgment of the trial court must be sustained; for on one material point, at least, the finding is silent. The finding does not show that the mare was seen by the engineer or fireman. It is to be remembered that the train was rightfully running along the track of which the appellant was the exclusive owner, that it was fenced as the law requires, and that the mare was wrongfully on it. The employees of the appellant were not under a duty to an owner to see animals wandering on a track securely protected, and here we are concerned only with their duty to the owners of wandering animals. Whether the appellant would have been liable had the engineer or fireman seen the mare, and taken no measures to stop the train or frighten her from the track, we need not decide, for it does not appear that they saw the animal. We do not believe that where an animal wrongfully on the track is not seen the railway company is liable, although one of its engines strikes and kills it. This is so, for the reason that the company owes no such duty to the owner of domestic animals, and where there is no duty there can be no negligence. We cannot say, as matter of law, that, because gestures and motions made by men along the track were unheeded, there was negligence. If this fact had been supplemented by a finding that the animal was seen on the track, then it may be that a different rule should be applied. Palmer *v.* Railroad Co., 112 Ind. 250; s. c., 31 Am. & Eng. R. R. Cas. 364. But where nothing is seen on the track engineers are not necessarily guilty of negligence, in such a case as this, for not attending to gestures made by persons near the track, unless the gestures are clearly such as to give fair and full warning that injury will result if the train is not halted. To

Presumption that animal will step from track.

Duty of train employees.

hold otherwise would place engineers in a position that would greatly and unjustly embarrass them in the performance of their duties, and subject them to unjust annoyance. In this case the meaning and character of the signs and gestures are not stated; and it is very clear that, whatever may be the rule in other cases, there is no ground for holding that the failure to heed signs and gestures constituted actionable negligence. Judgment affirmed.

Injury to Stock—Contributory Negligence.—See, *post*, Horner *v.* Williams, 155, and note.

Duty of Employees.—See, *post*, Wooster *v.* Chicago, M. & St. P. R. Co., 152, and note 154.

KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS R. CO.

v.

BOLSON.

(*Kansas Supreme Court, May* 6, 1887.)

Killing Stock — Evidence — Corporate Existence.—Where an action is brought in justice's court, under section 30, c. 84, Comp. Laws 1885, against a railway company for the killing of stock, and no answer is filed or appearance made by the defendant before the justice of the peace, and the defendant appeals to the district court, on the trial in the district court, it is not necessary for the plaintiff to prove that the railway company is a corporation to entitle him to recover. The proof that the defendant was a railway company operating said railway at the time of the injury, under section 30, is sufficient.

Same—Negligence—Sufficiency of Evidence.—Where the only proof to establish negligence of the defendant in killing stock is the fact that the place where stock was run over and killed by a moving freight train was at a point on the track where the persons in charge and operating said train could have seen the cow in time to have stopped the train, and the fact that the train was moving faster than the regular schedule time for such trains, in the absence of all showing when the cow went upon the track, is not sufficience evidence to establish negligence on the part of the defendant to entitle the plaintiff to recover.

ERROR to District Court, Montgomery County.

Defendant in error brought this action in justice's court against the plaintiff in error to recover damages for the killing of a cow by the defendant in the operation of its railroad through Montgomery county, Kansas. Defendant did not appear before the justice of the peace, and judgment was rendered for the plaintiff. Defendant appealed to the district court,

whereupon plaintiff obtained leave of the court to file amended bill of particulars. Defendant was not required to and did not file any answer. Defendant brings error to review a judgment for the plaintiff.

Geo. R. Peck, *A. B. Clark*, and *A. A. Hurd* for plaintiff in error.

J. D. McCue for defendant in error.

CLOGSTON, C.—The defendant in error has filed no brief, and therefore we cannot say upon what theory the defendant claimed that the judgment ought to be sustained. The plaintiff in error claims—*First*, that there is no evidence shown in the record to prove that the defendant is a corporation; and, *second*, that there is a failure to prove that the injury complained of was caused by the negligence of the defendant, or its agents or servants.

As to the first of these propositions, we think the learned counsel is in error; and we first suggest this question: Was it necessary for the plaintiff to prove that the defendant was a corporation, under his bill of particulars, to entitle him to recover? The statute under which this action was brought is as follows: "Every railway company or corporation in this State, and every assignee or lessee of such company or corporation, shall be liable to pay to the owner the full value of each and every animal killed, and all damages to each and every animal wounded by the engine or cars of such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not." Section 5205, Comp. Laws 1885. This statute makes the distinction between railway companies and railway corporations, and makes both liable for damages for stock killed or injured in the operation of the road; and the legislature, when it framed this section, doubtless thought, as counsel suggests, that a partnership or individual might operate a railroad without being incorporated; and, if they did, they ought to be liable as well as if they were incorporated. In this case, while the plaintiff alleged in his bill of particulars that the Kansas City, Lawrence & Southern Kansas R. Co. was a corporation, would this description of the defendant prevent him from recovering, provided he brought his action against the right railway company defendant? He brought his action against the company that was in fact operating the road, but described it as being a corporation; and his failure to make that proof that the company was incorporated, we think, under his bill of particulars, was immaterial. He established the fact that the train of cars that committed

Proof of corporate existence.

the injury was operated by the agents and servants of the Kansas City, Lawrence & Southern Kansas R. Co. Again, the defendant made no appearance in justice's court, but, after judgment against them, appealed to the district court. Who appealed? What company or corporation? Whoever it was it was the defendant; and, although it had been described as a corporation, yet it was the company that was sued that was appealing, and in the name of the Kansas City, Lawrence & Southern Kansas R. Co. removed said cause to the district court, and to this court; thereby admitting its existence either as a corporation or a railway company operating that line of road; and, it having done this, it is unnecessary for the plaintiff to prove more. But should we be mistaken in this proposition, we think the record shows evidence sufficient to submit this question to the jury; and the jury on this evidence, as shown by the record, was warranted in finding the defendant to be a corporation. Witness Phelps testified that the defendant was in the possession of the right of way, and had been ever since the road was built, some 12 years or more. And on the cross-examination of witness Hastings the following questions were asked and answered: "*Question.* Do you know that the Southern Kansas R. Co. is a corporation different from the Kansas City, Lawrence & Southern corporation? *Answer.* I do not; I understand they are the same identical road. *Q.* Do you know what a corporation is; can they be the same? *A.* I understand that they are the same." This evidence not only admits that the Kansas City, Lawrence & Southern Kansas R. Co. is a corporation, but it as well proves this fact by the witness. It is true, perhaps, that this was not the proper way to prove a corporation, but the defendant made the proof, and they cannot be heard now to say that the proof was incompetent.

As to the second proposition, we think the learned counsel is correct. The record shows no negligence on the part of the defendant, its agents or servants, in managing the train at the time of the injury complained of; and we can well see why the trial court might hesitate in submitting this question to the jury, or even submit it at all. The evidence relied on, or at least the only evidence offered for the purpose of showing negligence, was that the place where the cow was killed was at a point on the road where the engineer could have seen the cow for a distance sufficient for him to have stopped the train, and prevented the injury. This claim is clearly shown by the evidence; but there was a total failure on the part of the plaintiff to show when the cow went upon the track. The section men testified that, when the cars came by them where they were at work, about 150 yards from the place where the cow was run over, a whistle sounded the

Negligence—Sufficiency of evidence.

danger signal, and they looked up, and saw the cow on the track. This was the first they had seen of her. The engineer testified that the train was within 150 yards from the place where they struck the cow when she came on the track, and that he whistled for brakes and reversed his engine, and gave the alarm whistle for stock. The conductor in charge of the train testified that the signal for brakes was promptly responded to. Now, this evidence was undisputed. What more could the train men have done to have prevented this injury? It is also true that the train was running somewhat faster than the regular schedule time, but this fact alone is not sufficient to warrant the jury in finding defendant guilty of negligence, for the regulation in relation to the operation and running of freight trains is made by the railway company for their own convenience, and they have a right to run their trains at such rate of speed as to them seems advisable and their business demands.

There is one other question shown by the record we feel called upon to mention, although not complained of. That is the instruction of the court in withholding from the jury the question of demand provided for in section 5206, Comp. Laws 1885, and in substantially instructing the jury that, before they could find for the plaintiff, they must find that the injury complained of was caused by the negligence of the defendant. We think the evidence of a demand, as shown by the record, was sufficient to raise a question of fact, and ought to have been submitted to the jury; and as this question was not so submitted, and as the defendant has a right to have this question submitted and determined by the jury, we cannot direct a judgment of the findings of fact, as would otherwise be done by affirming the judgment.

It is recommended that the judgment of the court below be reversed.

By the court. It is so ordered; all the justices concurring.

Killing Stock—Evidence.—See, *ante*, Union Pacific R. Co. *v.* Blum, 119, and note, 121.

Speed as Evidence of Negligence in Action for Killing Stock.—See Louisville, etc., R. Co. *v.* Milan, 13 Am. & Eng. R. R. Cas. 507; Clark *v.* Boston & M. R. Co., 31 Ib. 548; Louisville, etc., R. Co. *v.* Marriott, 19 Ib. 509.

MISSOURI PAC. R. CO.

v.

METZGER.

(*Nebraska Supreme Court, April* 24, 1888.)

Killing Stock—Fence—Insufficiency.—In an action against a railway company for horses killed, the testimony showed that the railway was fenced with barbed wire; that at a point adjoining a certain bridge the wire was so close to the ground that the horses had stepped over the fence, leaving at least three bunches of hair from their legs on the barbs of the wire, and that their tracks were plainly seen where they had crossed the fence. *Held*, that the evidence sustained the charge of negligence on the part of the company in not protecting its railway by a sufficient fence, and that a verdict for the fare value of the horses would not be set aside.

Trial—Argument of Counsel—Prejudicial Effect.—An attorney in his argument to the jury should confine his discussion to the issues and the evidence in the case, and it is the duty of the trial court to see that he does so; and statements in regard to the adverse attorney, not in evidence, if calculated to prejudice the jury, may be sufficient to set the verdict aside.

ERROR to District Court, Cass County.

Action by Gottlieb Metzger against the Missouri Pacific R. Co. to recover the value of two horses that were killed on the defendant's track. Plaintiff's counsel, during his argument, called the attorneys for the defendant "the hirelings of Jay Gould," and one of them "one of the leaders of the Van Wyck boom in this county, now defending corporations." Defendant brings error to review a verdict and judgment for $250.

Beeson & Sullivan and *B. P. Waggener* for plaintiff in error.

M. A. Hartigan for defendant in error.

Maxwell, J.—The petition alleges that at a point on its line of railroad, and not within the incorporated limits of any city, village, or town or public highway, and at a point where it was the duty of the defendant company, by force of the statute, to erect and maintain a suitable and amply sufficient fence upon the sides of the defendant's line of railroad to prevent horses from getting on said railroad, that the defendant negligently, carelessly, and wrongfully did neglect and omit to erect and maintain a suitable and sufficient fence, as by law required, to prevent horses from getting on its railroad; but therein wholly failed and made default, and by reason of and in consequence of which negligence and carelessness, neglect,

Facts.

and default of defendant company, its agents, servants, etc., the horses aforesaid, the property of plaintiff, by reason of the premises strayed in and upon and got upon the track and right of way of defendant, and while so upon said railroad, they and each of them then and there were struck, run upon and against by a locomotive, and were killed, etc. The material allegations in the answer are as follows: That at the point where the mares described in the petition got on the defendant's track the defendant had erected a fence on each side of said track, and thereafter maintained said fences amply sufficient to prevent horses from getting on said track at said point, and had also constructed and built gates at farm crossings at said point as required by law, and had in all respects fully complied with the law of the State as to fencing its tracks and erecting gates at farm-crossings; that plaintiff's horses trespassed upon the premises of an adjoining proprietor upon whose premises a private farm crossing gate had been erected by defendant, which gate was under the control of the owner of said land, and, without any fault of defendant, its agents, or servants, said gate had been left open, and through which open gate plaintiff's mares escaped and thereby got on defendant's track, and were injured without any fault of defendants, etc. This was denied by the reply. The jury returned a verdict for $250, which is considerably less than the value of the horses as proved on the trial. The testimony shows that the railway is fenced with barbed wires, and that the wires, which joined up to the north end of the bridge where the horses were killed, were but a few inches above the ground. The proof also shows that the horses in question had stepped over the fence at that place. At least three bunches of hair, identified as having been rubbed off the horses' legs, were found on the barbs of the wire where the horse had stepped over the fence, and their tracks were plainly seen upon the ground. This testimony is, practically, uncontradicted, and clearly establishes the fact that a neglect to keep up the fence was the cause of the loss. The verdict, therefore, is fully sustained by the evidence, and will not be reversed because there are possible theories to account for the horses getting upon the track without the fault of the railway company.

Sufficiency of fence.

Some objection is made to the use of certain language in the argument of the case by the attorney for the defendant in error. It is the duty of an attorney in arguing a case to the jury to confine the discussion to the issue and evidence in that particular case; and it is the duty of the trial court to see that this rule is observed. The language used in this case, however, while objectionable, was not so far prejudicial as to justify a reversion of the case. It is evident

Argument of counsel.

that substantial justice has been done, and the judgment of the district court is affirmed.

The other judges concur.

Injury to Stock.—See, *ante*, Union Pac. R. Co. *v.* Blum, 119, and note, 121.

Fences—Sufficiency.—See, *ante*, Payne *v.* Kansas City, St. J. & C. B. R. Co., 113, and note, 117–119.

For a full discussion of the question of railway fences, see 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II, 2 (*d*), vi. See also Shellabarger *v.* Chicago, etc., R. Co., 19 Am. & Eng. R. R. Cas. 527. Halverson *v.* Minneapolis, etc., R. Co. 19 Ib. 526; Chicago, etc., R. Co. *v.* King, 20 Ib. 652; Hayt *v.* Detroit etc., R. Co., 19 Ib. 627.

ALABAMA GREAT SOUTHERN R. CO.

v.

SMITH.

(*Alabama Supreme Court, February* 24, 1888.)

Killing Stock—Negligence—Unavoidable Accident—Instruction.— In an action to recover damages for the killing of a cow, if the engineer in charge of the train testifies that the cow sprang on the track about 50 yards ahead of the train, that the animal was not and could not be seen before that time, and that, when discovered, all the appliances known to skilful engineers could not have stopped the train in time to save the cow, such circumstances, if true, would constitute a complete defence to the action, and call for an instruction regarding their effect.

APPEAL from Circuit Court, Etowah County.

Action by B. F. Smith against the Alabama Great Southern R. Co., to recover damages for the killing of a cow belonging to the plaintiff. The following charge was given by the court, at the plainfiff's request: "No. 2. That if the jury believe, from all the evidence, that the engineer in charge of the train did not use ordinary diligence in running the train at the place where the cow was killed by the cars of the defendant, and that said engineer failed to use all the necessary means known to skilled engineers to prevent the injury, then the verdict must be for the plaintiff." The defendant excepted, and, upon rendition of a judgment for plalntiff, assigned the giving of this charge as error.

Samuel Rice and *L. A. Dobbs* for appellant.

Whitlock, Walden & Son for appellee.

STONE, C. J.—The testimony of the engineer was to the effect that the cow sprang on the track about 50 yards ahead of the train; that the animal was not and could not be seen before that time; and that, when discovered, all the appliances known to skilful engineers could not have stopped the train in time to save the cow. If this be believed, it was a complete defence to the action. Charge No. 2, given at the instance of plaintiff, ignored this principle and the testimony stated above, and must work a reversal of the judgment rendered. East Tennessee V. & G. R. Co. *v.* Bayliss, 75 Ala. 466; s. c., 19 Am. & Eng. R. R. Cas. 480, East Tennessee, Va. & G. R. Co. *v.* Deaver, 79 Ala. 216; Alabama, Gt. S. R. Co. *v.* McAlpine, 80 Ala. 73; s. c., 22 Am. & Eng. R. R. Cas. 602; Railroad Co. *v.* Caldwell, 4 So. Rep. 445. Reversed and remanded.

Company Not Liable For Unavoidable Injury.—Chicago, etc., R. Co. *v.* Packwood, 7 Am. & Eng. R. R. Cas. 584; East Tenn., etc., R. Co. *v.* Bayliss, 19 Ib. 480; Savannah, etc., R. Co. *v.* Geiger, 29 Ib. 274; Joyner *v.* South Car. R. Co., 29 Ib. 258; Little Rock, etc., R. Co. *v.* Turner, 19 Ib. 451; Alabama, etc., R. Co. *v.* McAlpine, 22 Ib. 602 and; see, *ante*, Savannah, Florida & Western R. Co. *v.* Rice, p. 150; see also Union Pac. R. *v.* Blom, 119, and note, 121.

Duty of Trainmen.—See, *ante*, Dennis *v.* Louisville, N. A. & C. R. Co., 141; Kan. City, L. & S. R. Co. *v.* Bolson, 144; *post*, Wooster *v.* Chicago, M. & St. P. R. Co. 152; Horner *v.* Williams, 155.

Stock-killing—Duty of Engineer.—In Yazoo, Mississippi Valley R. Co. *v.* Brumfield (Miss.), 4 So. Rep. 341, the plaintiff sued to recover damages for the killing of certain mules. It appeared from the testimony that the mules were in plaintiff's pasture, through which the railroad ran, and were feeding in a depression near the track. As the train emerged from a cut, the mules were startled and ran along and towards the track ahead of the engine. The engineer sounded the cattle alarm and for brakes, and did all he could to avert the collision (the mules having got on the track ahead of the train), but failed. It was held that the evidence was not sufficient to establish the liability of the railroad company. The court further held that instructions to the effect that, if the train could have been stopped by the exercise of reasonable care after the mules were in sight near the railroad track, the plaintiff was entitled to recover; and also that, if the train could have been easily stopped after the mules were in sight and near the track, the jury should award to the plaintiff as damages the value of the mules, and such additional sum as should seem just and proper as punitary damages;—were erroneous; and declared that a charge ought to have been given that, if the mules were in the depression below the track from which the track was not easily accessible to them, it was not necessarily the duty of the engineer to stop the train as soon as they were seen, but that such duty was a question of fact for the jury.

In Bedford *v.* Louisville & Texas R. Co. (Miss.), 4 So. Rep. 121, the plaintiff sued to recover the value of a mare killed by one of defendant's trains. The only witness, the engineer, testified that, when he saw her running on the railroad, he sounded the cattle whistle. This appeared to be the only step he took, and he did not testify that it was all that he could have done properly for the safety of the animal. It was held that it could not be said, as a matter of law, that the engineer had fulfilled his duty in endeavoring to prevent the accident, and that an instruction directing a verdict for the defendant was erroneous.

WOOSTER

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Iowa Supreme Court, June* 5, 1888.)

Killing Stock—Contributory Negligence—Duty of Engineer.—In an action to recover damages for the killing of stock, if the employees in charge of the train knew, or ought to have known, that the cattle were upon the railroad track and could, by the use of ordinary care and prudence, have avoided the injury after the danger was or should have been discovered, the contributory negligence of the plaintiff and of his employees in driving the cattle upon the track without looking for approaching trains is immaterial and does not affect the liability of the defendant company.

APPEAL from District Court, Jones County.

Action by Saline Wooster against Chicago, Milwaukee & St. Paul R. Co., to recover damages for the killing of certain cattle belonging to the plaintiff. The defendant appeals from a judgment for the plaintiff. The case is stated in the opinion.

A. L. Bartholomew and *Thompson & Lansing* for appellant.

Herrick & Dorsee and *E. Keeler* for appellee.

ROTHROCK, J.—1. The first question to be determined is a motion filed by appellee to strike the evidence from the files of this court because it was not properly made of record by a bill of exceptions. The bill of exceptions by which it was sought to preserve the evidence was what he denominated a "skeleton bill." It referred to the evidence to be inserted therein as follows: "Here insert plaintiff's evidence;" "Here insert evidence of defendant." There was no other reference to the evidence. The motion must be sustained. The bill of exceptions does not identify the evidence, nor indicate any source from which it is to be obtained. It is a mere general direction to the clerk to insert the evidence, and leaves the question as to what it was entirely to the discretion of the clerk. We have frequently determined that this is insufficient. Hill *v.* Holloway, 52 Iowa, 678; Wells *v.* Railroad Co., 56 Iowa, 520; s. c., 2 Am. & Eng. R. R. Cas. 243; Tootle *v.* Insurance Co., 62 Iowa, 362.

2. It appears, from the pleadings and from the instructions given by the court to the jury, that the plaintiff's cattle were in charge of his son, who attempted to drive them over the defendant's railroad track, and that some of them were struck and killed by a passing engine. The defendant requested the

court to instruct the jury that, if they found, from the evidence, that the person who had the cattle in charge knew that the defendant's track was to be passed over by the cattle, and that he did not look or listen for an approaching train, but suffered the cattle to go upon the track without taking these precautions, this would in law be contributory negligence, and the plaintiff could not recover. The court refused to give this instruction, and, on its own motion, instructed the jury as follows: "In determining whether plaintiff or his son in charge of said cattle were negligent and contributed to the injury, you may consider whether said son was a suitable person to have charge of the cattle; whether, as an ordinarily prudent person, he should have anticipated the passing of the train at the time; whether he looked and listened for any train, or would have seen one if he had looked, or heard it if he had listened; whether any train was in sight at the time the cattle commenced crossing the track; whether, in the management of said cattle, he acted as an ordinarily prudent person,—and all other facts and circumstances in evidence before you. And, if you find therefrom that plaintiff's son did not use ordinary care in his conduct at the time, then he was negligent. And, if such negligence contributed to produce the injury complained of, plaintiff cannot recover." The court, at the request of the defendant, submitted a special interrogatory to the jury, which, with the answer thereto, was as follows: "Did the person in charge of plaintiff's cattle at any time before driving the same over defendant's track look or listen for the train, or take any precaution to ascertain whether or not any train was approaching the crossing?" Answer.—"No." It is urged, by counsel for appellant, that the answer to the special interrogatory is inconsistent with the general verdict, and the motion was made in the district court for judgment for the defendant on the special verdict. It is true, as claimed by the defendant, that the answer to the special verdict was a complete and explicit finding that the person in charge of the cattle was guilty of contributory negligence. Where a person recklessly approaches and attempts to cross a railroad track without looking or listening for an approaching train, and "without taking any precaution to ascertain whether or not any train is approaching," he is chargeable with contributory negligence. But, notwithstanding this legal proposition is well established, it does not necessarily follow that the plaintiff is not entitled to recover. The petition is grounded on the alleged fact that the servants and employees of the defendant in charge of the train knew, or ought to have known, that the cattle were upon and crossing over the track, and that, having such knowledge or means of

Instructions—Contributory Negligence—Failure to exercise ordinary care.

knowledge, they negligently failed to make any effort to slacken the speed or stop the train, and that, by reason of said negligence the cattle in question were killed. And the court instructed the jury, in substance, that, if the employees of defendant, by use of ordinary care and prudence, could have avoided the injury after the danger was or should have been discovered, then the defendant was guilty of negligence. In this view of the case, the contributory negligence of the plaintiff becomes immaterial, and a recovery may be had, notwithstanding the cattle were negligently driven upon the crossing. Morris *v.* Railroad Co., 45 Iowa, 29. It is to be presumed that the evidence submitted to the jury authorized the instructions given by the court; and it does not therefore necessarily follow that the answer to the special interrogatory was inconsistent with the general verdict. The defendant, under the pleadings and instructions, might well have been liable for the injury, notwithstanding the negligence of the person in charge of the cattle. For the same reason, the instructions requested by the defendant were properly refused. It did not follow that the defendant was entitled to a verdict if the plaintiff's son did not look and listen for an approaching train before driving the cattle upon the crossing. We think the judgment of the district court must be affirmed.

Killing Stock—Duty of Engineer.—Regarding the duty of engineers in cases of injury to stock, see, *ante*, Alabama Great Southern R. Co. *v.* Smith, 150, and note, 151.

As to duty of employees generally, see, *ante*, Dennis *v.* Louisville, New Albany & Chicago R. Co., Kansas City, Lawrence & Southern Kansas R. Co., 141.

Contributory Negligence Immaterial when injury to stock could have been avoided by exercise of proper care. Farmer *v.* Wilmington, etc., R. Co., 88 N. C. 564; s. c. 20 Am. & Eng. R. R. Cas., 481.

HORNER

v.

WILLIAMS.

(*North Carolina Supreme Court, March* 12, 1888.)

Killing Stock—Contributory Negligence—Situation of Pasture.—It is not contributory negligence, *per se*, to pasture cattle in an inclosed lot situated on both sides of the railroad, although the stock-law is in force in the country where such pasture is situated.

APPEAL from Superior Court, Granville County.

Action against the lessee of the Oxford & Henderson R. to recover damages for negligently killing a cow. The defendant appeals from a judgment for the plaintiff. The opinion states the case.

A. W. Graham for plaintiff and appellee.

C. M. Busbee for defendant and appellant.

DAVIS, J.—Civil action originally commenced before a justice of the peace for the county of Granville to recover the value of plaintiff's cow, killed on defendant's road, and carried by appeal to the superior court, and tried before Shepherd, J., at fall term, 1887, of said court. It was admitted that plaintiff's cow was killed by defendant's railroad, a month before this action was brought; that the value of the cow was $50; that Granville is a stock-law county; and that defendant's railroad is duly incorporated. The defendant denied the negligent killing, and also alleged contributory negligence, and two issues were submitted: (1) Did defendant kill plaintiff's cow through negligence? (2) Was the killing caused by negligence of the plaintiff contributory thereto? The first issue was found in the affirmative, and the second in the negative. There was evidence, independent of the statutory presumption, tending to show negligence on the part of the defendant, but there is no exception or question before us bearing upon the first issue, and it is only necessary to state so much of the case as is material to the question involved in the second issue,—that is, contributory negligence. Facts—Questions presented.

It was evident that the plaintiff's cow, with other cattle, was in an inclosure containing about 40 acres, used for a pasture, lying on both sides of the railroad, with a fence extending to the bed of the road on each side of the same, and with cattle-guards be-

tween the ends of the fence, where the same came to the railroad; that three fourths of the land was on the left side of the road going from Oxford to Henderson, and within that portion there was a fish-pond near said railroad track; and there was also a branch of water within and running through the same portion of said inclosed parcel of ground or pasture and near to and parallel with said railroad track; that the cattle pasturing in said inclosed parcel of ground or pasture were turned into the same on that side which lay on the right of said railroad in going from Oxford to Henderson, and were usually turned into the same about 7 o'clock A.M., and taken out a little before sundown, and that the schedule time for defendant's train to leave the depot was 9:15 A.M.; that cattle running in said inclosed parcel of ground or pasture could not pass from the portion of the same lying on either side of said railroad to the other, without crossing said railroad track, and could at any and all times freely cross said railroad track, in order to pass from the portion of said inclosed parcel of ground or pasture lying on either side of said railroad to the other, there being no fence or other obstruction to prevent them from doing so; that cattle running in said inclosed parcel of ground or pasture had no access to water except at said fish-pond or branch, at which, when running in said pasture, they were accustomed to drink; that on the morning of the day when plaintiff's cow was killed she was turned into said inclosed parcel of ground or pasture, along with other cattle, at or about 7 o'clock A.M., and was running loose and unguarded with said other cattle therein; that defendant's regular train left the depot at Oxford for Henderson the same morning at the usual time, according to schedule, to wit, at or about 9:15 o'clock A.M. It was also in evidence that going from the Oxford depot towards Henderson there was a heavy descending grade to and entirely through the inclosed parcel of land. The defendant's counsel asked no special instructions of the court. Among other things the court charged the jury, on the second issue, that the fact that plaintiff had fenced in 40 acres of land, through which the railroad ran, as a pasture, and kept his cattle therein, would not constitute contributory negligence. To this the defendant's counsel excepted. There was judgment for the plaintiff, and the defendant appealed.

It is insisted by the defendant that the plaintiff was guilty of contributory negligence in putting his cow and other cattle in an inclosure such as is described in the evidence, and allowing them to run loose and unguarded therein, with nothing to prevent them from crossing and recrossing the railroad track at will, and that the court erred in the instruction given to the jury. Granville is a "stock-

Plaintiff not guilty of contributory negligence.

law" county, and the able and learned counsel for the defendant insists that it was a wrongful act on the part of the plaintiff to permit his cattle to run at large, or, what is alleged to be worse, "pen" them on the railroad. We do not concur in this view; but think that there was no error in the charge of his honor that it was not contributory negligence to put cattle in a pasture of 40 acres through which the railroad ran. The fact that the stock law was in force could make no difference, even if the fact of negligence on the part of the defendant rested upon no positive evidence, but only upon the statutory presumption. This is settled by Roberts *v.* Railroad, 88 N. C. 560; s. c., 20 Am. & Eng. R. R. Cas. 473, cited by defendant. In Farmer *v.* Railroad, Ib. 564; s. c., 20 Am. & Eng. R. R. Cas. 481, in considering the question of contributory negligence, Ashe, J., said: "If the act (of the plaintiff) is directly connected, so as to be concurrent with that of the defendant, then his negligence is proximate, and will bar his recovery; but where the negligent act of the plaintiff precedes, in point of time, that of the defendant, then it is held to be a remote cause of injury, and will not bar a recovery, if the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant." So that, assuming, in this case, that it would be negligence to turn cattle in a pasture of 40 acres, as described in the evidence, even then it would not be such a direct and proximate cause of the injury as to bar the plaintiff's recovery, if caused by the want of reasonable care and prudence on the part of the defendant. But we do not think the fact of turning the cattle into such a pasture was, *per se*, negligence, and we content ourselves with a reference to Farmer *v.* Railroad, *supra*, and the cases there cited. There is no error.

Contributory Negligence as a Defence in Actions for Killing Stock.—See, generally, Kansas City, etc., R. Co. *v.* McHenry, 6 Am. & Eng. R. R. Cas. 581; Kansas Pac. R. Co. *v.* Landis, 6 Ib. 581; Van Horn *v.* Burlington, etc., R. Co., 7 Ib. 591; Richardson *v.* Chicago, etc., R. Co., 13 Ib. 654; Welty *v.* Indianapolis, etc., R. Co., 24 Ib. 331; Alabama, etc., R. Co. *v.* McAlpine, 15 Ib. 544; Burlington, etc., R. Co. *v.* Franzen, 15 Ib. 530; Krebs *v.* Minneapolis & St. Louis R. Co., 20 Ib. 478; Farmer *v.* Wilmington, etc., R. Co., 20 Ib. 481; Burlington, etc., R. Co. *v.* Webb, 22 Ib. 617; Pittsburg, etc., R. Co. *v.* Heiskall, 13 Ib. 555; Richardson *v.* Chicago, etc., R. Co., 13 Ib. 654; Carey *v.* Chicago, etc., R. Co., 20 Ib. 469; Wabash, etc., R. Co. *v.* Nice, 23 Ib. 168; Texas, etc., R. Co. *v.* Young, 13 Ib. 544; Cleveland, etc., R. Co. *v.* Scudder, 13 Ib. 561; Pittsburg, etc., R. Co. *v.* Smith, 13 Ib. 579; Evans *v.* St. Paul, etc., R. Co., 13 Ib. 653; Congdon *v.* Central Vermont R. Co., 20 Ib. 460; Atchison, etc., R. Co. *v.* Gabbert, 22 Ib. 621; Donovan *v.* Hannibal, etc., R. Co., 26 Ib. 588; Union Pac. R. Co. *v.* Schwenck, 13 Ib. 653; Alabama, etc., R. Co. *v.* Jones, 15 Ib. 549; Atchison, etc., R. Co. *v.* Shaft, 19 Ib. 539; Western Maryland R. Co. *v.* Carter, 13 Ib. 573; Waiter *v.* Chicago, etc., R. Co., 20 Ib. 481; Savannah, etc., R. Co. *v.* Geiger, 29 Ib. 274; Prickett *v.* Atchison, etc., R. Co., 23 Ib. 232; Central R. Co. *v.* Hamilton, 23 Ib. 207; Burlington, etc., R. Co.

v. Brinkman, 11 Ib. 438; Roberts *v.* Richmond, etc., R. Co., 20 Ib. 423; Washington *v.* Baltimore, etc., R. Co., 10 Ib. 747; Leavenworth, etc., R. Co. *v.* Forbes, 31 Ib. 532; Amstein *v.* Gardiner, 16 Ib. 585; Hynes *v.* San Francisco, etc., R. Co., 20 Ib. 486; Timins *v.* Chicago, etc., R. Co., 31 Ib. 541; Tyler *v.* Illinois, etc., R. Co., 19 Ib. 519.

For a full discussion of the question of contributory negligence, and its effect on the liability of railway for injury to or killing of stock, see 7 Am. & Eng. Encycl. of L., tit. "FENCES," II, 2, (*d*), viii, 2, (*b*).

DAVIDSON

v.

CENTRAL IOWA R. CO.

(*Iowa Supreme Court, September* 5, 1888.)

Killing Stock—Contributory Negligence—Driving Stock Along Track.—If the owner of stock opens the gate at a crossing and drives his stock on the right of way, intending to drive them along the right of way to another crossing and there turn them off the railroad into a field, he is guilty of such contributory negligence as will prevent a recovery for stock killed while being so driven.

Same—Opening Fence.—Plaintiff unwound the wires of a fence from the post where the wires terminated, and, through the opening so made, drove his stock into a field. He claimed that he restored the fence to its original condition. It appeared, however, that the stock escaped through the same opening upon the railroad track, where some of them were killed. The wires were not broken, but were found to have been unwound from the post. The cattle had never broken through at that point before, and there was testimony to the effect that the fence had been recently repaired by the defendant's employees, and the wires securely fastened. *Held*, that no negligence on the part of the defendant company in maintaining the fence had been shown, and that, in the absence of testimony showing negligence of the running of the train which killed the stock, the plaintiff could have no recovery.

APPEAL from District Court, Henry County.

Action by J. T. Davidson against the Central Iowa R. Co., for damages for killing and injuring live stock belonging to the plaintiff. Defendant appeals from a verdict and judgment for the plaintiff. The facts are stated in the opinion.

Anthony C. Daly for appellant.

Woolson & Babb for appellee.

ROTHROCK, J.—1. The plaintiff is the owner of a farm of 640 acres, upon which he keeps a large number of cattle and

other live-stock. The railroad of the defendant runs through the farm, and the right of way is fenced with posts and barbed wire. There are three private farm-crossings over the railroad; that is, there are three places where gates are erected on each side of the right of way, for the passage of live-stock across the track, and for other purposes. The plaintiff claims that, by reason of a defect in the railroad fence, a calf owned by him came upon the track and was killed by a passing train, and that at another time, for the same reason, some of his sucking pigs escaped through the fence and were killed in like manner. The jury found the defendant liable for these casualties, and we do not discover that the defendant was prejudiced by any rulings in regard to these causes of action. Facts.

2. In another count in the petition the plaintiff claimed damages for the killing of two colts, not by reason of the want of a fence, but because of the alleged negligence of the defendant in operating the train which caused the injury. The colts did not go upon the railroad track by reason of the want of a fence. The fact is, that the plaintiff opened one of the gates at a crossing and left the opposite gate closed, and drove the colts on the right of way, intending to drive them along the right of way to another crossing, and there turn them off the railroad into a field. When he had driven the animals upon the right of way, he discovered a freight train approaching, which run down upon the colts, and run them into a cattle-guard. The act of negligence which he claims renders the defendant liable is that the employees of the train did not, after they discovered the colts on the track, use proper efforts to avoid the injury. The bare statement of the fact that the plaintiff drove his colts on the track, not for the purpose of crossing over the railroad, but to drive them along inside the right of way fences, shows that he was guilty of most culpable negligence. His sole right to recover is based upon the fact that, notwithstanding his negligence, the men in charge of the train ought to have so managed it after they discovered the danger, as to have saved the colts from injury. There is a dispute in the abstracts as to the evidence, and an examination of the whole record in the case convinces us that the employees in charge of the train did everything that could reasonably be required of them in the premises. Indeed, we feel well satisfied that there was no warrant, in the evidence, for finding them guilty of negligence in any respect. We do not deem it necessary to set out the evidence here, but content ourselves with the statement that the verdict upon this cause of action is without support in the evidence. Plaintiff's contributory negligence—Negligence in running train.

3. In another cause of action in the petition the plaintiff

claimed damages for killing ten cattle and injuring three others.

Facts in reference to second cause of action.

There are two counts in the petition in reference to these cattle. One bases the right of recovery on the alleged negligence of defendant's employees in operating the train, and single damages are claimed. The other count bases the right of recovery upon the failure of the defendant to properly fence where it had the right to fence, and double damages are claimed under the statute. The facts in reference to this cause of action are that on August 5, 1886, the plaintiff had about one hundred head of cattle, horses, and colts pasturing in a field south of the railroad. In the evening of that day he took these cattle, horses, and colts to the north side of the railroad, to a 40-acre field, which had recently been mowed, and in which there was no pasture, in order that they might get water. He opened the south gate of one of the crossings, and, instead of taking the stock over the track and through the north gate, he drove them a little west, and made an opening in the barbed-wire railroad fence at the corner of the 40-acre field, and drove the stock through the opening. There were four wires in the fence, and at the place where the plaintiff made the opening, the posts were about one rod apart. It appears that all of the four wires ended at one of the posts, and the ends were wound around the post and then round the wire. The plaintiff succeeded in making the opening by unwinding the wire. He claims that, after the stock passed through, he wound the wire around the post just as it was before. But the fact remains that some time in the night the stock passed through and upon the track at that place, and early on the next morning a passenger train, running at great speed, ran into the herd, and killed ten cattle and injured three others. It appears from the evidence that some one opened the fence at the same place on the day before the plaintiff drove his stock through the fence. The evidence is undisputed, and consists of the positive statement of several witnesses, that on the evening of August 4th the fence was open at that place, and that it was safely and securely repaired by the defendant's sectionmen; and the evidence is equally clear that no stock had ever before this come upon the track at the place where the opening was made. The plaintiff claimed that his cattle escaped from the 40-acre field by reason of the defendant's failure to keep up and maintain a proper fence. The above-recited undisputed facts would rather indicate that, if the plaintiff had not made the opening in the fence, the accident would not have happened. The plaintiff offered to prove that the opening of the fence was a necessity, because there was a ditch between the railroad track and the north gate which rendered the

Evidence to prove necessity of opening in fence.

crossing defective, and that it was impossible to cross the track at that point. But he did not claim, in his petition, that the defendant was chargeable with any negligence in this respect, and the court very properly held that the offered evidence was inadmissible under the issues. The plaintiff did not amend his petition, but proceeded with the trial, and the condition of the crossing was not a material question in the case. We do not hold that one may not, under some circumstances, make an opening in a fence upon a railroad line. There may be facts which will justify such an act upon the ground of necessity. No such state of facts appears from the record in this case, and in view of the fact that the stock was turned into a place where there was no pasture, and that they went upon the track at the very place where the opening had been made in the fence, and in view of other evidence tending to show that plaintiff had opened the fence at the same place, and left it open, on the 4th of August, there was much ground for finding that the cattle did not come upon the track by reason of any negligence of the defendant in failing to keep up and maintain a sufficient fence. The plaintiff, so far as this record shows, had no right to take down the fence. He claims that it was insufficient; that the wires were not properly spaced; that the lower wire was 30 to 32 inches from the ground; and that he put the wires back just as he found them. As he opened the fence when he had no right to do so, he ought to be held responsible for leaving it with the lower wire 30 inches from the ground. On the morning the cattle were killed, the lower wires were found not broken, but unwrapped from the post and pushed aside so as to allow the cattle to pass through. As they were fastened on the evening of the 4th of August, it was a physical impossibility for the cattle to have unwrapped the wire from the post by any pressure upon it, and it follows that the fence could not have been in the same condition it was before the plaintiff meddled with it. We think the verdict cannot be sustained upon the ground of the alleged negligence of the defendant with reference to the condition of the fence; and it cannot be sustained upon the ground that the trainmen were negligent in running the train after they discovered the cattle upon the track. The evidence shows, without conflict, that there was no such negligence, and the jury so found in answer to a special interrogatory. It is true that, in addition to an answer to the interrogatory, the jury found that the engineer "might have seen the cattle sooner." Whether this was regarded by the jury as a reason why there should be a verdict for the plaintiff, we cannot determine. If it was so considered, it was contrary to the instructions of the court, by

Cattle not on track by reason of defendants negligence.

which the jury were explicitly directed that the defendant would be liable if the engineer, "in the exercise of ordinary care, could and should have prevented said accident after he actually saw the cattle on the track." The jury had no right, under this instruction, to wander into the field of inquiry as to what the engineer might have seen. The jury found, specially, that the calf and pigs were of the value of $14. We find no error as to these claims. The cause will be reversed as to the other claims, and remanded for a new trial. If plaintiff so elects, a judgment may be entered in the court below for the claims for the calf and pigs; the question of costs of the former trial to be determined by the district court.

Killing Stock—Insufficiency of Evidence.—See, *ante*, Union Pacific R. Co. *v.* Blum, 119, and note, 121.

Contributory Negligence as a Defence.—See, *ante*, Horner *v.* Williams, 155, and note, 157.

WILDER

v.

CHICAGO AND WEST MICHIGAN R. CO.

(*Michigan Supreme Court, May* 18, 1888.)

Fences—Injuries to Stock—Depot Grounds—Burden of Proof.—If a railroad company pleads in defence to an action to recover damages for the killing of stock, that the place where the stock entered upon its track was within depot grounds, the burden of proof is upon the company to establish that fact.

Same—Attorney's Fees—Constitutional Law—Class Legislature.—A statute which authorizes the taxing of an attorney's fee against a railroad company in addition to the costs in the event of a judgment being recovered against it for killing or injuring stock, through its failure to fence its road, is in the nature of a penalty imposed upon a class, and is therefor open to the objection that it is class legislature, and is unconstitutional and void.

ERROR to Circuit Court, Newaygo County.

Action to recover damages for injuries to a cow belonging to the plaintiff. The opinion states the case.

Smith, Nims, Hoyt & Erwin for appellant.

John Harwood for appellee.

MORSE, J.—The plaintiff brought suit in justice court to recover damages for injury to a cow which was struck by the cars on the track of defendant's road near the depot in the village of

Alleyton, in Newaygo county. It was claimed that the defendant's road was not fenced as required by the statute. The justice rendered judgment for the plaintiff for $25 damages and $31.75 costs of suit. The costs included an attorney fee of $25, imposed by authority of the statute. Pub. Acts 1885, p. 356, act 234. The cause was removed by *certiorari* to the circuit court for the county of Newaygo, error being alleged as follows: First, that the testimony did not show any cause of action in favor of the plaintiff against the defendant; second, that the justice erred in the assessment of the $25 attorney fee as part of the plaintiff's costs. The circuit judge affirmed the judgment of the justice, and the defendant brings error to this court. **Facts.**

The first claim of defendant is that the cow entered the defendant's premises within the station or depot grounds, which are not required to be fenced. McGrath *v.* Railroad Co., 57 Mich. 555; s. c., 22 Am. & Eng. R. R. Cas. 574. The following is a statement taken from the brief of defendant's counsel: "At Alleyton there is but one highway that crosses the railroad. This highway, in the language of the case, 'runs past the depot, and crosses the main and side tracks.' The cow was standing about thirty feet north of the highway, and within one hundred feet of the depot. There were no cattle-guards at the crossing, and on the west side of the track, north of the highway, was a space of two or three rods not fenced. At which of these places the cow got on the track does not appear." In the evidence, as set out in the application for the writ, there is testimony tending to show this unfenced portion of the defendant's road to be within the station grounds. But in the return of the justice (by which we must be governed) no such testimony appears, although the evidence taken on the trial is returned by him. According to the return it was shown by one witness that "the only place cows could get on the track, north of the highway, was from and across the highway, and through this open space." The cow was struck north of the highway, and about 30 feet from it. The defendant offered no proof. It was for the railway company to show that this open, unfenced space was within its station grounds. We are unable to ascertain from the testimony whether it was within or without such grounds, and therefore cannot disturb the judgment as to damages. **Fences—Depot grounds—Burden of proof.**

But the imposing of the attorney fee of $25 as costs cannot be upheld. The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in **Imposing attorney's fee—Constitutional law.**

all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25, if it fails to successfully maintain its defence. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of $10 in justice court, but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25—for it is nothing more or less than a penalty. Calling it an "attorney fee" does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. "The genius, the nature, and the spirit of our State government amounts to a prohibition of such acts of legislation, and the general principles of law and reason forbid them." Dunkee *v.* City of Janesville, 28 Wis. 464, 468; Calder *v.* Bull, 3 Dall. 387, 388. Here the legislature has granted special advantages to one class, at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to force them to impose penalties in the disguise of costs upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defence in the courts when suits are brought against them. It was suggested by plaintiff's counsel, upon the argument, that the $25 is not imposed by the statute as a matter of distinction between the suitors, but as a punishment to the corporation for not obeying the law as to the fencing of its right of way, and that, if the railway company properly fenced its track, and complied with the law, it might then stand equal in the courts with the plaintiff in actions of this kind. But penalties cannot be prescribed and enforced in this way, and, whatever may have been the object or intent of the legislature, the result of the statute is an injustice and an inequality, as before shown, which the courts cannot tolerate, and must disregard in the administration of the laws. Besides, a penalty of $25 per day is imposed by this act upon the railroad corpor-

ation for the neglect to construct and maintain the fences required by the statute. Pub. Acts 1885, p. 357.

The judgment of the justice is affirmed as to damages and costs, excepting as to the $25 attorney fee, which is reversed and vacated. Costs of this court to defendant, and of the other courts to plaintiff.

The other justices concurred.

Duty of Railway Co. to Fence.—As to the duty of railway companies to fence, see, *ante*, Rhines *v.* Chicago, N. W. R. Co., 123, and note, 125; Payne *v.* Kansas City, St. J. & C., B. & Q. R. Co., 113, and note, 117; *post* Rinear *v.* Grand Rapids R. Co., 166.

In Lafferty *v.* Chicago & West Michigan R. Co. (Mich.), 38 N. W. Rep. 660, the plaintiff sued to recover damages for the killing of a cow belonging to her. The defendant owned and operated a railroad running through the unincorporated village of Alleyton where it had a station on its road. The railroad is crossed at that point by a single highway only, and the station house is situated immediately at the crossing and there are no fences and cattle-guards at that point, and on either side of the railway, for a long distance from the crossing, the railroad being practically unfenced for nearly two thirds of a mile, and without cattle-guards along the whole distance. The plaintiff's cow got upon the right of way at a point somewhere within the unfenced portion. The court held that the evidence showed that the railway station and highway crossing were so situated that the railway could be fenced along both sides of that portion of the line up to the highway, and cattle-guards put in and maintained at the crossing without interference with the mutual convenience of the railroad and the public in transacting their business, and also that the evidence was sufficient to warrant a judgment against the company for the cow.

Same—Depot Grounds.—As to depot grounds, the liabilites of railway companies for animals injured by getting upon the track, on such ground, see, *ante*, Johnson *v.* Chicago & N. W. R. Co., 131, and note, 132–134.

Same—Damages—Attorney's Fees—Constitutionality of Statute.—The decision of the court in the principal case as to the constitutionality of the attorney's fee of $25 was followed by it in the cases of Lafferty *v.* Chicago & West Michigan R. Co. (Mich.), 38 N. W. Rep. 660; and Rinear *v.* Grand & Indiana R. Co., *post*, p. 166.

It was held by the supreme court of Illinois in the case of Peoria, D. & E. R. Co. *v.* Duggan, 109 Ill. 536; s. c., 20 Am. & Eng. R. R. Cas. 407–489, that the legislature may authorize the recovery of attorney's fees in suits against railroad companies for killing cattle, where such killing is occasioned by failure to fence. But the supreme court of Ark. held, in the case of St. Louis & Im. R. Co., (Ark.), 31 Am. & Eng. R. R. Cas. 555. Held, that an act of the legislature of that State provided that where stock is killed or injured by railroads, the damages shall be assessed by arbitration, and if either party refuse to abide by the award, and takes the case before the courts, and shall not recover on more favorable judgment then the award, such party shall be assessed a reasonable attorney's fee, and the opposing litigant is unconstitutional.

RINEAR

v.

GRAND RAPIDS AND INDIANA R. CO.

(*Michigan Supreme Court, June* 15, 1888.)

Fences—Duty to Construct—Depot Grounds.—In an action to recover damages for killing stock, if the liability of the company depends upon the question whether the place where the stock entered the track was or was not within depot grounds, the criterion by which such question is to be decided is whether, in view of the present or prospective needs of such grounds for station or depot use, the company has exercised a reasonable discretion in using them for that purpose; and, if such question is undisputed, it becomes a question of law for the court whether the defendant company is liable.

ERROR to Circuit Court, Antrim County.

Action to recover damages for the killing of a cow belonging to the plantiff. The defendant appeals from a judgment and verdict for plaintiff. The case is stated in the opinion.

T. J. O'Brien and *J. H. Campbell* for appellants.

Frank E. Robson for appellee.

CHAMPLIN, J.—Plaintiff brought suit before a justice of the peace, to recover damages for killing a cow belonging to plaintiff, and recovered a judgment. The defendant appealed to the circuit court, where the case was tried by a jury, who rendered a verdict for plaintiff. There is no dispute that the cow was running at large in the village of Alba, Antrim county, on the 19th day of June, 1886, and that she entered upon defendant's right of way at a point about 18 rods south of the depot building, and, while walking north upon the main track, was struck and killed by the locomotive of a passenger train. The premises of the defendant were not fenced at the point where the cow entered upon defendant's right of way. The defence is that the point where the cow entered upon defendant's premises was part of the depot grounds of the defendant at Alba, and that the defendant was not required to fence there. The liability of defendant is predicated upon its negligence in not maintaining and having fences and cattle-guards on and along its right of way where the animal entered upon its premises. The facts which determine the rights of the parties to this suit are undisputed. The station or depot grounds at Alba extend from a point at or near the highway crossing, on the north

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of the depot building, to a point 18 or 20 rods south of such building, at least as far south as the switch of the side track on the east side of the main line. There was testimony which showed that logs were piled even farther south of the switch, on the west side of the track, to be loaded on cars. The space along the switch had been used to pile lumber, and load the same upon the cars for shipment, as far south as to within six rods of a certain fence called the "Stevens fence," which united with the fence along defendant's right of way south of its station grounds. A portion of this space was used for the passage of teams in hauling logs. The cow entered upon defendant's right of way north of the switch. The fact that this space of six rods, or thereabouts, which had been provided by the defendant to accommodate its patrons in piling freight for shipment, had not been actually used for that purpose, does not deprive it of its character as station grounds. The court charged the jury that, in determining the question of depot grounds, it wouid include the sidetracks and switches necessary for the business of the station, and for the storage of cars, and the running of trains in order to allow others to pass, etc., and then left it to the jury to find whether the switches and sidetracks for the accommodation of that depot extended farther south than where the cow entered upon the track; and, if they did, then she entered upon depot grounds, and the company was not liable; and, if it did not so extend farther south than where the cow came on the track, then it is not and has not been dedicated as depot grounds, and, if it has not been used as such, then the company is liable. The court erred. The criterion is not whether all the grounds set apart for depot and station purposes have been actually used, but whether, in view of the present or prospective needs of such grounds for station or depot purposes, the company has used a reasonable discretion in throwing them open for that purpose. Where, as in this case, the testimony shows, without dispute and beyond question, that the station grounds are not unreasonably extensive for the accommodation of the public and of the patrons of the road at that place, and that the animal entered upon the premises of defendant within the limits of its station grounds, the court should not have submitted the question of the extent of such grounds to the jury, for the reason that, the facts being undisputed, it became a question of law for the court whether the defendant was liable. The principles laid down in McGrath *v.* Railroad Co., 57 Mich. 555; s. c., 22 Am. & Eng. R. R. Cas. 574, rules this case, and the court should have granted the request of defendant's attorney, and directed a verdict for defendant. The question of the $25 attorney's fee, which was included in the judgment rendered by the justice,

Depot grounds —Failure to fence.

has been disposed of by the recent cases of Schut *v.* Railway Co., 38 N. W. Rep. 291, and Wilder *v.* Railway Co., *ante*, 289,

The judgment must be reversed, with costs of both courts to defendant, and a new trial granted.

SHERWOOD, C.J., and MORSE and CAMPBELL, JJ., concurred.

Duty to Fence—Depot Grounds.—See, *ante*, Johnson *v.* Chicago & N. W. R. Co., 131, and note, 132–134; *post*, Beckdalt *v.* Grand Rapids & I. R. Co., next case, and note.

BECKDOLT

v.

GRAND RAPIDS AND INDIANA R. CO.

(*Indiana Supreme Court, February* 17, 1888.)

Fences — Duty to Construct — Station — Sidings — Highways. — Railroad companies are not required to fence their tracks at stations or sidings where either freight or passengers are received and discharged, or across streets or highways, or at other points where public convenience will not permit fence to be erected, and consequently are not liable for the killing of animals which may wander upon their tracks at such places and be killed without negligence on the part of such companies.

APPEAL from Circuit Court, Jay County.

Action to recover damages for killing two horses belonging to the plaintiff. The opinion states the case.

W. H. Williamson, *W. C. Ladd*, and *D. T. Taylor* for appellant.

J. P. O'Rourke for appellee.

NIBLACK, J.—This was an action for damages, brought by John W. Beckdolt against the Grand Rapids & Indiana R. Co., for running over and killing two horses of the alleged aggregate value of $300. The complaint was in three paragraphs. The first charged that the point at which the horses entered upon the railroad track was not securely fenced. The second repeated the charge, that at the point in question the railroad was not securely fenced, but was negligently left open and uninclosed; that near the place at which the horses entered upon the track two strips of fence, one on each side of the road, had been so negligently and improperly erected as to constitute a wedge-shaped chute or *cul de sac*, into which the horses were forced by the defendant's cars, and negligently run over and killed, without any fault of the plaintiff. The third alleged that the defendant did, through the fault, misconduct,

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and negligence of its servants and employees, and without any fault on the part of the plaintiff, run against and over the horses at a point on the railroad known as "Collett's Station," and did thereby kill and destroy them, and that also, at the time said horses were killed, the defendant then and there neglected to sound the whistle attached to its locomotive at a distance of from 80 to 100 rods from a public crossing and station at which said horses were killed; that the killing of the horses was occasioned by such neglect to sound the whistle of the defendant's locomotive. The defendant answered in two paragraphs, the first in denial and the second averring affirmative matters in defence. A demurrer to the second paragraph being first overruled, issue was joined upon it, and the cause was sent to a jury for trial. The jury returned a verdict for the plaintiff, assessing his damages at $250, accompanied with numerous interrogatories submitted to them at the request of the parties respectively. Construing the interrogatories submitted to them at the request of the plaintiff, in connection with their answers, the jury answered substantially as follows: First, that the horses first entered on the railroad grounds at a point where the road was not fenced, but at which it could have been fenced, and from there wandered to a place where the road could not be fenced, and were there killed; second, that the plaintiff did not contribute any negligence to the killing of the horses; third, that the defendant's engineer did not, at a point from 80 to 100 rods north of the public highway crossing, where the horses were killed, sound the whistle on his engine three times distinctly. Construing, in like manner, the interrogatories submitted to them at the defendant's request, in connection with the answers returned to them respectively, the jury answered to the effect following: First, that the horses entered the defendant's right of way connected with its railroad track from a public highway which crosses the track at Collett Station; second, that there was no fence at the place at which the horses entered the railroad grounds: third, that the defendant did not use the right of way where the horses entered upon it, and south of the highway, for station purposes; fourth, that the placing of a fence and cattle-guards on the south side of the public highway, between that and the railroad grounds south of and adjoining such highway, would have obstructed the free passage of passengers over said railroad grounds where such passengers were received upon and discharged from the defendant's trains; fifth, that there was a sidetrack at Collett Station, commencing ou the east side of the main track, south of the public highway, about 525 feet, and extending north across said highway to a point about 495 feet north of the same; sixth, that at and prior to the time at which the horses were struck and killed, the defendant used the rail-

road track both north and south of the highway in receiving freight; seventh, that the placing of cattle-guards on either side of the highway, where the sidetrack crosses it, would have obstructed the free passage of the defendant's employees in the use of such side track and of the station grounds, and have endangered their lives and limbs; eighth, that the cattle-guards and fence across the railroad track were at Collett Station, 225 feet south of the highway; ninth, that the cattle-guards and fence across the railroad north of the highway were 330 feet from the station last named; tenth, that the horses strayed from the plaintiff's inclosure onto the highway, and then entered upon the railroad track from the highway; eleventh, that the plaintiff's field from which the horses strayed was at the time inclosed by a sufficient fence; twelfth, that the horses got out of the plaintiff's field through an inclosure; thirteenth and fourteenth, that the plaintiff knew that one of his horses had, two nights before, got out of the field over the fence; fifteenth, that there was no order of the board of commissioners of Jay county permitting horses to run at large; sixteenth, that the engineer in charge of the locomotive which struck and killed the horses sounded the whistle of his engine once when he reached the signal-board north of, and as he approached the highway at, the railroad station; seventeenth, that the engineer also caused the bell of his engine to be rung from the time the whistle sounded until his engine reached the highway crossing; eighteenth, that, as soon as the engineer observed the horses, he sounded the whistle to frighten them from the track; nineteenth, twentieth, and twenty-first, that the supervisor of the road was guilty of negligence in failing to cause the railroad to be properly fenced, and that it was his negligence in that respect which caused the death of the horses; twenty-second, that this failure of the supervisor of the road constituted the only act of negligence which caused the death of the horses; twenty-third, that the plaintiff, after he placed the horses in the field the night before they were killed, did not examine the fences to see if they were all up and in good condition; twenty-fourth, twenty-fifth, and twenty-sixth, that, if the plaintiff had made such an examination, he would not have discovered any insecure or insufficient places in the fences, but that he might have examined the fences if he had desired to do so; also, that the horses first entered the defendant's right of way south of the highway and west of the railroad track; twenty-seventh, that the place at which the horses first entered upon the railroad track was between the cattle-guards at the north and the south ends of the sidetrack, respectively; twenty-eighth, that it could not be said that the failure of the engineer to sound the whistle of his engine three times distinctly at from 80 to 100 rods from the highway crossing caused the injury to the horses

complained of. The defendant moved for judgment in its favor upon the answer to the interrogatories, notwithstanding the general verdict; and its motion was sustained. Final judgment was accordingly awarded in favor of the defendant. Questions were reserved below and are reserved here upon the overruling of the demurrer to the second paragraph of the answer, and upon the rendition of judgment in favor of the defendant, notwithstanding the general verdict.

The point made against the sufficiency of the second paragraph of the answer is that, while assuming to answer the entire complaint, it only answered certain parts of it; and authorities are cited in support of the claim that an answer obnoxious to such an objection is bad upon demurrer, as it undoubtedly is. Work Pr., § 588. But in what respect the paragraph failed to answer the entire complaint is not stated, and no specification is made of any particular defect in the paragraph under such circumstances. No question is presented on that pleading, and we must assume that the demurrer to it was rightly overruled. Besides, a casual reading of the paragraph induces the belief that it amounted only to an argumentative denial of the complaint.

Sufficiency of second paragraph of answer.

As applicable to the answers to the interrogatories, the contention is that, in the most essential respects, they were inconsistent with each other, and hence did not, as a whole, antagonize the general verdict to the extent of justifying the circuit court in refusing to enter judgment upon it. This contention is especially directed to those answers of the jury which have reference to the place at which the horses entered upon the railroad track. We are unable, nevertheless, to place the construction contended for upon those answers. The answer to the first interrogatory submitted at the request of the plaintiff was more in the nature of a legal conclusion than the finding of a fact. It did not either indicate the place or the kind of place at which the horses went on the track further than to state that it was at a point where the track could have been fenced, but was not. This cannot well be treated as a special finding upon a particular question of fact, within the meaning of our Civil Code. There are many places on lines of railroad which, as a physical possibility, could be fenced in, but are not, because they ought not to be. It is as to facts, and not to merely speculative inferences, which a jury may be required to answer. The answer, therefore, to the interrogatory in question, was not materially inconsistent with answers to other interrogatories on the same subject, which constituted special findings of particular facts. It is now the accepted law of this State that railroad companies are not required to fence their tracks at stations and sidings where either

Answers to interrogatories—Conflict with general verdict.

freight or passengers are received and discharged, or across streets or highways, or at other points, where public convenience will not permit fences to be erected, and are consequently not liable to pay for animals which may wander upon their tracks at such places and be killed without negligence on the part of such companies. Railway Co. *v.* Quick, 109 Ind. 295, and authorities cited. Some of the other answers state mere conclusions, and still others are only collateral and incidental to the matters really at issue between the parties; but, taking all the answers, which amount to a finding of facts, into consideration, the plain inferences are: First, that the horses went onto the right of way, and thence upon the track from the highway, at a place at which the track was not, and ought to have been, fenced; secondly, that the horses afterward wandered upon the track and were killed without negligence on the railroad company's part; thirdly, that the engineer in charge of the locomotive which struck and killed the horses caused the whistle to be sounded as he approached Collett Station in the manner and at the time as is impliedly required by section 2178, Rev. Stat. 1881. These inferences negatived all the material allegations of the complaint, and hence defeated the plaintiff's asserted right to recover in the action. None of these inferences are in serious conflict with the finding that it was the failure of the supervisor to have the railroad properly fenced which caused the death of the horses. Railroad Co. *v.* Spencer, 98 Ind. 186; Railroad Co. *v.* Evans, 53 Pa. St. 250. That finding was a mere conclusion not sustained by the facts from which it was presumably drawn. The facts thus referred to tended towards an entirely different conclusion, which was that, at the place at which the horses entered upon the track, was one where the railroad was not, and ought to have been, fenced in, and hence that the company's failure to fence the track at that place had no wrongful connection with the killing of the horses.

Duty of company to fence at stations and sidings.

Other questions are discussed, but what we have said must necessarily result in the affirmance of the judgment. We need not, therefore, further extend this opinion. The judgment is affirmed, with costs.

Duty to Fence.—As to the common-law and statutory duty of railroads to fence their right of way, see, *ante*, Payne *v.* Kansas City, St. J. & C. B. Co., 113, and note, 117–119; Johnson *v.* Chicago & N. W. R. Co., 131, and note, 132–134; Wilder *v.* Chicago & W. M. R. Co., 162, and note, 165. See also 7 Am. & Eng. Encyc. of Law tit. "FENCES," II, 2, (*a*) and (*b*).

Same—Depot Grounds.—As to the duty of railroad companies to fence depot grounds, sidetracks, and the like, see, *ante*, Johnson *v.* Chicago N. W. R. Co., 131, note, 132–134; *post*, Peters *v.* Stewart. Statutes requiring railroad companies to fence their track are held not to apply to depot and station grounds. Galena & C. M. R. Co. *v.* Griffin, 31 Ill. 303; Louisville, N. A

& C. R. Co. *v.* Skelton, 94 Ind. 222; s. c., 19 Am. & Eng. R. R. Cas. 542; Pittsburg, C. & St. L. R. Co. *v.* Crandall, 58 Ind. 365; Ohio & M. R. Co. *v.* Rowland, 50 Ind. 334; Indianapolis & C. R. Co. *v.* Oestels, 20 Ind. 231; Smith *v.* Chicago, M. & St. P. R. Co., 60 Iowa, 512; s. c., 13 Am. & Eng. R. R. Cas. 534; Latty *v.* Burlington, C. R. & M. R. Co., 38 Iowa, 250; Plaster *v.* Illinois C. R. Co., 35 Iowa, 449; Cleveland *v.* Chicago & N. W. R. Co., 35 Iowa, 320; Smith *v.* Chicago & N. W. R. Co., 34 Iowa, 506; Packard *v.* Illinois C. R. Co., 30 Iowa, 474; Durand *v.* Chicago & N. W. R. Co., 26 Iowa, 559; Rogers *v.* Chicago & N. W. R. Co., 26 Iowa, 558; Davis *v.* Chicago & N. W. R. Co., 26 Iowa, 549; Atchison, T. & S. F. R. Co. *v.* Shaft, 33 Kan. 521; s. c., 19 Am. & Eng. R. R. Cas. 529; Wilder *v.* Chicago R. Co. (Mich.), *ante*; Chicago & G. T. R. Co. *v.* Campbell, 47 Mich. 265; s. c., 7 Am. & Eng. R. R. Cas. 545; Flint & P. M. R. Co. *v.* Lull, 28 Mich. 110; Kobe *v.* Northern Pacific R. Co., 36 Minn. 518; s. c., 31 Am. & Eng. R. R. Cas. 528; Schooling *v.* St. Louis, K. C. & N. R. Co., 75 Mo. 518; s. c., 13 Am. & Eng. R. R. Cas. 533; Robertson *v.* Atlantic & P. R. Co., 64 Mo. 412; Swearingen *v.* Missouri, K. & T. R. Co., 64 Mo. 73; Lloyd *v.* Pacific R. Co., 49 Mo. 199.

For a full discussion of the question of the liability of railway companies for killing animals on depot and station grounds and in the immediate vicinity of engine-houses, machine-shops, car-houses, wood-shops, and the like, see 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II, 2, (*d*) ii.

Street and Highway Crossings.—A railroad company is not bound to fence its track at a point where it is crossed by a street or public highway. Ohio & M. R. Co. *v.* Rowland, 50 Ind. 349; Indianapolis & C. R. Co. *v.* Parker, 29 Ind. 471; Lafayette & I. R. Co. *v.* Shriner, 6 Ind. 141; Soward *v.* Chicago & N. W. R. Co., 30 Iowa, 551; Atchison, T. & S. F. R. Co. *v.* Holt, 29 Kan. 150; s. c., 11 Am. & Eng. R. R. Cas. 206; Flint & P. M. R. Co. *v.* Lull, 28 Mich. 510; Iba *v.* Hannibal & St. J. R. Co., 45 Mo. 469; McPheeters *v.* Hannibal & St. J. R. Co., 44 Mo. 22; Meyer *v.* North Mo. R. Co., 35 Mo. 352; Hurd *v.* Rutland & B. R. Co., 25 Vt. 116. But where the street of one has been abandoned by the public, the company is not exempted from its liability to fence. See Toledo, W. & W. R. Co. *v.* Howell, 38 Ind. 447; Toledo, W. & W. R. Co. *v.* Cary, 37 Ind. 172; Jeffersonville, M. & I. R. Co. *v.* O'Connor, 37 Ind. 96; Whitewater Valley R. Co. *v.* Quick, 30 Ind. 384. *Compare* Indiana C. R. Co. *v.* Gapen, 10 Ind. 292; Elliott *v.* Hannibal & St. J. R. Co., 66 Mo. 683; Meyer *v.* Northern Mo. R. Co., 35 Mo. 353. For a full discussion of the question of the exemption of railway companies from the duty of fencing at public crossings, see 7 Am. & Eng. Encyc. of Law, tit. "FENCES," II, 2, (*d*) i.

PETERS

v.

STEWART *et al.*

(*Wisconsin Supreme Court, September* 18, 1888.)

Fences — Duty to Construct — Depot Grounds — What Constitutes.— Grounds upon the main track of a railroad company, upon which are a water-tank for replenishing engines, and a building in which there is a telegraph-office, a ticket-office, and a place for eating and sleeping, which building is occupied by the company's station men and agent in connection with the management of the road, and upon which there is also a platform at which trains are in the habit of stopping, are, though limited, depot grounds, within the meaning of the Wisconsin statute regulating the fencing of railroads.

APPEAL from Circuit Court, Ashland County.

The defendants were sued as trustees of the Wisconsin Central R. Co., for the value of horses killed, June 15, 1883, by reason of their running into a railroad bridge of the company, in consequence of its track not having been fenced. The material allegations of the complaint were denied. At the close of all the testimony, the court directed a verdict for the defendants, which was rendered accordingly. From the judgment entered thereon, the plaintiff brings this appeal.

Miles & Shea for appellant.

D. S. Wegg and *Howard Morris* for respondents.

CASSODAY, J.—The railroad crossed Silver creek upon a long iron bridge near Ashland. The plaintiff owned the lands on both sides of the right of way and railroad grounds for some distance westerly from that bridge. The plaintiff's barn stood little north of the railroad grounds, and some 300 feet west of the iron bridge. From a point nearly opposite the barn the company had a spur or side track, 903 feet in length, running westerly to the main track. At the time in question, the plaintiff's three horses were loose, feeding near the barn, when a freight train came upon the iron bridge from the east, and the horses ran westerly upon the spur track, and from thence upon the main track, along which they continued to go until they went into the railroad bridge, some three quarters of a mile west of the iron bridge, and were killed. After crossing the iron bridge, the freight train stopped for a few minutes, and again stopped before reaching the bridge where

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the horses were entangled. There was no fence on either side of the railroad grounds, right of way, or track for a distance of two miles westerly from the iron bridge. The right to recover is predicated wholly upon such absence of any fence. The statute requiring railroads to be fenced excepts therefrom "depot grounds." Section 1810, Rev. St., as amended by chapter 193, Laws 1881. The only controversy here is whether the place where the horses thus got upon the track was within what are thus designated "depot grounds." It appears, in effect, from the undisputed evidence, that at the side of the main track, and opposite the sidetrack mentioned, there were, at the time in question, a water-tank for replenishing engines, and another building, within which there was a telegraph-office with telegraphic instruments, a ticket-office, and a place for eating and sleeping, and which building was occupied by the company's station men and agent, who operated the telegraph, sold tickets for the company to passengers, operated the switch and tank and handled baggage and freight; that there was a platform between the building and the track; that trains were in the habit of stopping there, and receiving and discharging passengers and freight. True, the accommodations were quite limited, but, under the decisions of this court, we must hold that this station building was a depot, and that the railroad grounds in connection therewith were "depot grounds," within the meaning of the statute. Dinwoodie *v.* Railway Co., 70 Wis. 163. It follows that the horses got upon the track from the depot grounds, which neither the company nor the defendants were required to fence. This being so, the injury and death of the horses were in no way attributable to the absence of any fence which the statute required the compnny to build. Bremmer *v.* Railroad Co., 61 Wis. 114; s. c., 19 Am. & Eng. R. R. Cas. 575. These depot grounds extended about 1500 feet westerly from the iron bridge. There was no regular highway across them, and hence the question as to the duty of constructing and maintaining cattle-guards at such crossings, and connecting the same with such fences, under the statute cited, does not arise. The judgment of the circuit court is affirmed.

What are "depot" grounds.

Duty to Fence—Depot Grounds.—As to the exemption of liability of railroad companies from fencing depot and station grounds. and the like, see, *ante*, Johnson *v.* Chicago & N. W. R. Co., 131, and note, 132–134; Wilder *v.* Chicago & N. W. R. Co., 162; Rinear *v.* Grand Rapids & I. R. Co., 166, and note; Beckdolt *v.* Grand Rapids & I. R. Co., 168, and note, 172–174.

Depot Grounds—What Are.—For a full discussion as to what constitutes station yards and depot grounds, see 7 Am. & Eng. Encycl. of L., tit. "FENCES," II, 2, (*d*), viii, 1, (*a*).

HUNT

v.

LAKE SHORE AND MICHIGAN SOUTHERN R. CO.

(Indiana Supreme Court.)

Fences — Private Crossings — Liability of Company.—If a land-owner whose lands are intersected by a railroad track takes advantage of the Indiana statute which authorizes him, of right, to construct and maintain crossings across the railroad, and imposes upon him the duty of constructing and maintaining gates thereto, the companies are not, in the absence of negligence, liable for the injuring or killing of cattle at such crossings, even though the cattle may not have been the property of the land owner, but belonged to a third person.

Same—Existing Crossings.—Under said statutes the railroad company is not liable for injuries to such stock, although the crossing may have been constructed long before the passing of the statutes.

Same—Title of Act—Constitutionality.—A statutory provision that "all gates and bars at farm crossings shall, in the absence of an agreement or contract to the contrary, be constructed, maintained and kept closed by the owner of the farm crossing," may be competently inserted in a statute entitled "an act requiring railroad corporations and other persons operating and controlling railroads to fence their right of way on railroad track and to construct barriers and cattle guards at certain public roads and highway crossings, and keep the same in repair, prescribing remedies and penalties for failure to do so," and is not unconstitutional and void as not being within the reasonable purview of the title.

APPEAL from Circuit Court, La Porte County.

Action to recover damages for the killing of stock alleged to have been caused through the failure of the defendant company to construct and maintain fences as required by statute. The plaintiff appeals from a judgment for the defendant. The questions in issue appear in the opinion.

John H. Bradley for appellant.

Geo. G. Green, John H. Baker, and *O. G. Getsendanner* for appellee.

ZOLLARS, C.J.—The material facts in the case as stated in the pleadings and found specially by the court below are these: More than 20 years before the cause of action, as relied upon by appellant, accrued, the appellee railway company, by appropriate condemnation and appropriation proceedings, under the statutes then in force, acquired a right of way through the lands then and now owned by B. C. Bowell, and constructed its railway thereon. On the lands of Bowell there

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is a farm crossing and two gates, which were constructed by the railway company about 20 years ago for his use and convenience, and which have been kept in repair by the railway company since their construction, without any contract or agreement on its part so to do. Appellant is, and for some years has been, the owner of land adjoining that owned by Bowell. These tracts of lands were separated by a partition fence sufficient to turn live-stock. On the night of the twenty-third day of March, 1886, appellant's horses were upon his pasture land. On that night a portion of the partition fence was thrown down by a storm, and three of the horses went through one of the openings, onto the land of Bowell, and from there through one of the farm gates, which had been left open by some unknown person, onto the railway, and were there killed by a train of appellee's cars. The railway through the land of Bowell was securely fenced at the place where, and at the time, the horses entered upon it, except in so far as the leaving of the gates open, at the time and in the manner above stated, rendered it insecurely fenced.

Upon the foregoing facts, the court below concluded, as a matter of law, that appellee is not liable, and rendered judgment accordingly. From that judgment appellant prosecutes this appeal, and claims that the court below erred in its conclusions of law, and in its rulings upon the pleadings, which presented the same question.

The liability of the railway company under the facts pleaded and found by the court is dependent upon the construction, scope, and effect to be given to the acts of April 8 and 13, 1885 (Acts 1885, pp. 148, 224). Acts were passed by the legislature in 1852, 1853, and 1863, making railway companies liable for animals killed upon their tracks. 1 Rev. St. 1852, p. 426; 1 Gavin & H. St. 522; 1 Rev. St. 1876, p. 751. The first section of the act of 1863 was amended in 1877, but in no regard material here. Acts Sp. Sess. 1877, p. 61. The act, as so amended, was carried forward into the revision of 1881. Rev. St. 1881, § 4025 *et seq.* In each of the acts there was a section providing that the act should not apply to any railway securely fenced in, "and the fences properly maintained, by the company." Such was the statute prior to those of 1885. The necessity resting upon railway companies to construct and maintain fences, in order to escape the liability imposed by the statute, prior to those of 1885; the sort of fences required in order to escape such liability; the localities where fences might be dispensed with, without incurring such liability; and the liability of such companies where the animals entered upon the track through gates at farm crossings, and were killed or injured,—have been settled by numerous judicial

Duty to fence —Statutory provisions.

interpretations of those several statutes. Construing those statutes, it was held that, where a person through whose land a railway was constructed agreed to build and maintain fences along the right of way, the road as to him would be regarded as fenced; and that if he failed to build and maintain such fences, and his animals passed to the track and were killed, he could not recover from the railway company on the ground that it had not fenced its track as required by the statute. Railroad Co. *v.* Smith, 16 Ind. 102; Railroad Co. *v.* Mussetter, 48 Ind. 286; Bond *v.* Railroad Co., 100 Ind. 301; s. c., 23 Am. & Eng. R. R. Cas. 200, and cases there cited. And so it was held that where a railroad company had securely fenced its track, and permitted an adjoining land-owner to erect, in such fence, draw-bars and gates for his own convenience in crossing the road, and, by reason of the neglect of such land-owner to maintain such bars or gates, his stock passed to and upon the track, and was killed or injured, the company was not liable for the damages sustained, nor was it liable to the tenant of such land-owner whose stock passed through such gate to the track, and was there injured or killed. Railroad Co. *v.* Shimer, 17 Ind. 295; Bond *v.* Railroad Co., *supra*, and cases there cited; Railway Co. *v.* Goodbar, 102 Ind. 596. It was further held that an adjoining land-owner for whose benefit a private crossing was constructed and maintained by the railway company could not recover against the company under the statute, where his stock passed to the track through the gates of such crossing, which he had neglected to keep closed. Railway Co. *v.* Mosier, 101 Ind. 597; s. c., 22 Am. & Eng. R. R. Cas. 569; Railway Co. *v.* Williamson, 104 Ind. 154; s. c., 23 Am. & Eng. R. R. Cas. 203. It was for a time held that, under such circumstances, the railway company was not so liable to such land-owner, nor to any other person whose stock entered upon the track through such gate. Railroad Co. *v.* Adkins, 23 Ind. 340; Railroad Co. *v.* Adkins, Id. 345; Railroad Co. *v.* Petty, 25 Ind. 413; Railway Co. *v.* Suman, 29 Ind. 40.

Private crossings—Gates and bars.

So far as those cases exempted railway companies, under such circumstances, from liability to others than those for whose convenience such crossings and gates were constructed and maintained, they were doubted, and virtually overruled, by the case of Railroad Co. *v.* Ridge, 54 Ind. 39. Since the decision of that case until the present time, it has been held that while railway companies were not liable, under the statutes prior to those of 1885, for the injury or killing of animals of adjoining land-owners for whose convenience private crossings and gates were constructed, where the animals passed to the track through such gate, which such land-owner failed to keep closed, they were lia-

ble to other persons whose animals might pass through such open gates to the track, and be there injured or killed. Railway Co. *v.* Thomas, 84 Ind. 194; s. c., 11 Am. & Eng. R. R. Cas. 591; Bond *v.* Railroad Co., *supra;* Railway Co. *v.* Mosier, *supra;* Railway Co. *v.* Goodbar, *supra;* Railway Co. *v.* Williamson, *supra.* Such was the law at the time the acts of 1885 were passed. Under the law as thus settled, there could be no question as to the liability of appellee under the facts pleaded and found in the case before us.

It is contended by counsel for appellant that railway companies are liable in cases like this, just as they were formerly, notwithstanding the acts of 1885. On the other hand, it is contended by counsel for appellee that, under those acts, there is no liability on the part of railway companies in such cases. The first section of the act of April 8, 1885, provides that owners of land separated by the right of way of a railway company may, if such right of way has been acquired by condemnation or appropriation, enter upon the same, and construct and maintain wagon and drive ways over and across such right of way leading from one of such tracts to another on opposite sides of such railway, etc. Section 2 provides that, where such railroad is fenced on one or both sides at a point where such way is constructed, such owner shall erect and maintain substantial gates in the line of such fence or fences across such way, and keep the same securely locked, when not in use by himself or employees.

Acts of 1885 —Counsel's contentions.

Section 3 provides that, if animals are killed or injured on the track of such railroad by the cars or locomotives thereof, the company owning and operating such railroad shall not be liable to pay damages therefor, if such animals entered upon the track of such railroad through such gates, unless it shall be proved that such killing or injury was caused by the negligence of the servants of the company owning or operating such railroad.

Of sections 1, 2, 3, and 4 of the act of April 13, 1885, it is sufficient in this connection to say that, among other things, they provide generally for the fencing of railways, and the maintenance of such fences by railway companies, and, in certain cases, for such fencing and maintenance by adjoining land-owners at the expense of such railway companies, and for the saving of rights of action under former laws. Section 5, the last section of the act, is as follows: "All gates and bars at farm crossings shall, in the absence of a contract or agreement to the contrary, be constructed and maintained and kept closed by the owner of such farm crossing." In support of the contention for the liability of appellee in this case, appellant's counsel argue: First, that sections 2 and 3 of the act of April 8, 1885, relate wholly

to gates at crossings constructed by adjoining land-owners under the power given by the first section of the act, and have no relation whatever to gates at crossings constructed before the act took effect, or voluntarily constructed by the railway company for the convenience and use of such land-owners; second, that section 5 of the act of April 13, 1885, has reference also to gates and crossings constructed by land-owners under the power given by the first section of the act of April 8, 1885; third, that the first section of that act is unconstitutional; fourth, that said sections 2, 3, and 5 are so connected with and dependent upon that section that they must fall with it; and, fifth, that section 5 of the act of April 13th is invalid, because not within the title of the act.

Rules of construction.

While the first two arguments, based upon a technical construction of certain words of the statute, are not without plausibility, they have not convinced us that the construction of the statute contended for is the correct one. On the contrary, our examination has led us to the conclusion that counsel's contention cannot be maintained. It is a settled principle that, in the construction of statutes, the intention of the legislature must govern. To ascertain that, the judiciary may look to the letter of the statute; to the statute as a whole; to the circumstances under which it was enacted; to the old law, if any; to the mischief intended to be remedied, and all like matters; and should endeavor, as far as practicable, to make such an application of the provisions of the statute as will best promote the object of its enactment. A construction which would lead to an absurdity, or possible injustice or contradiction, or unreasonable result, is always to be avoided, if possible. Middleton *v.* Greeson, 106 Ind. 18, and cases there cited.

Animals getting on track at private crossings—Company not liable.

It is conceded in argument that, prior to the statutes of 1885, the land-owner could not obtain a private crossing over a railway except with the consent of the railway company. Where such crossings were allowed, they were by the grace of the company. And while it was held that, as between the railway company and the land-owner, for whose benefit the crossing and gates were allowed the road would be regarded as securely fenced, it was held, as we have seen, that, as to other persons, the company was bound at its peril to see that the gates were kept closed, and was liable to such persons for the injury or killing of their animals, which passed to the track through such gates. Liability could not be certainly avoided, except by refusing crossings to all farmers. To allow such crossings for the convenience of adjoining land-owners, whose land was separated by the railroad, was regarded by the companies as so reasonable as not to

be denied. There was constant contention on the part of railway companies that, having granted such reasonable privilege to such land-owners, they should not be held liable to any one for the injury or killing of animals getting upon the track through the gates at such crossings left open through the neglect of such land-owners. The argument was that they should not be convicted and punished as for a wrong, when the privilege granted was so eminently reasonable. And so this court, as we have seen, for some time held.

The statutes of 1885 enacted into a right, on the part of the land-owner whose land is separated by rights of way of railway companies, in certain cases, what was before but a privilege voluntarily granted by such companies. Those statutes also impose upon such land-owners the duty of keeping the gates at such crossings closed, and thereby relieve the railway companies from all liability for the injury or killing of animals that they may pass to the track through such gates.

Under the first section of the act of April 8th the right of the land-owner to force a crossing over the track is by the terms of the section limited to cases where the right of way was or may be acquired by condemnation or appropriation proceedings.

Was it the intention of the legislature in the enactment of the statutes of 1885 that, where crossings may be forced over the track, railway companies shall be relieved from all liability on account of the gates being left open by the land-owner for whose benefit such crossing is constructed, and that they shall still be held liable as formerly in all cases where such crossings had been, or may be, constructed by the license of or voluntarily by railway companies for the use and convenience of such land-owners? To answer this question in the affirmative would be to so construe the statutes as to lead to an unreasonable result. The result of such a construction as stated, in substance, by counsel for appellee, would be this: (1) Where crossings and gates have been or may be constructed under the power given by the first section of the act of April 8, 1885, on a part of the right of way acquired by condemnation proceedings, the railway company is under no obligation or duty to keep the gates closed, and will not be liable to any one for the injury or killing of animals going upon the track at such gates, unless negligence is averred and proven. (2) If the crossing and gates have been constructed since the act of April 8, 1885, took effect, and on a part of the right of way acquired otherwise than by condemnation proceedings, the railway company is bound, as to all persons except the land-owner for whose convenience the crossing and gates have been constructed, and his tenants, to keep the gates closed, and will be liable, without proof of negligence, for the injury or killing of animals going upon the track through

such gates. (3) If the crossing and gates were constructed before the act of April 8, 1885, took effect, as to all persons except the land-owner for whose benefit the crossing was constructed, and his tenants, the railway company is bound at its peril to keep the gates closed, and will be liable for the injury or killing of animals going upon the track through such gates, however the right of way may have been acquired.

Evidently, it was not the purpose of the legislature in the enactment of the statutes to fix such varying measures of liability on the part of railway companies in connection with farm-crossings. Whatever room there might be for argument upon the act of April 8th, standing alone, section 5 of the act of April 13th is broad and comprehensive in its terms, and covers all cases of farm-crossings. To say that section imposes upon the land-owner the duty of keeping such gates closed only as between himself and the railway company, and that it does not relieve the company from the duty of keeping them closed as to third parties, is to convict the legislature of the folly of enacting what was the law already. The result of the legislation is, and doubtless the purpose of the legislature in the enactment of the statutes was, to limit the liability of railway companies as connected with farm-crossings as it was limited by the case of Railroad Co. *v.* Adkins, *supra*, and the cases following it. This construction of the statutes establishes what we think was the purpose of the legislature—a uniform rule of liability on the part of railway companies as connected with farm-crossings. A contrary ruling could be of no practical and lasting advantage to those for whose convenience any of such crossings may have been constructed, nor to others. If, as conceded, the crossings and gates constructed prior to the acts of 1885, or across rights of way acquired by means other than condemnation, were, in the absence of contract, constructed and have been maintained under a mere license from the railroad company, or were constructed and have been maintained by the company as a matter of favor merely, doubtless, in most cases, the license may be revoked, the favor discontinued, and the crossing permanently closed by the company. Should that be done, the farmer would have no remedy but in the exercise of the power given by the first section of the act of April 8, 1885. And the exercise of that power would bring the case clearly within the provisions of the acts of 1885, as construed by counsel for appellant, and the railway company would not be liable to any one for the injury or killing of animals going upon the track through the gates thus constructed. And thus railway companies would have it in their power to ultimately bring almost every case within the terms of the acts of 1885, as interpreted by appellant's counsel. If it be said that there may be

some crossings which have existed for such a length of time and under such circumstances that the license on the part of the railway companies has ripened into an irrevocable right, so that they may be and are maintained against the wishes of the company, then such cases would be clearly within the spirit of the acts of 1885, as also interpreted by appellant's counsel. If, as in effect contended, the exemption from liability on the part of the railway companies, under the acts of 1885, as connected with farm-crossings, exists only where the company has no power to prevent such crossings, the above possible cases would clearly fall within the reason and spirit of the exemption.

It is argued, as before stated, that section 5 of the act of April 13th is invalid because not embraced in the title of the act. The title of the act is as follows: "An act requiring railroad corporations, and other persons operating and controlling railroads, to fence their right of way and railroad track, and to construct barriers and cattle-guards at certain public roads and highway crossings, and to maintain and keep the same in repair, and prescribing remedies and penalties for failing to do so." Without extending this opinion in the way of argument, we are satisfied that the fifth section of the act is so much a part of, and so connected with, the subject expressed in the title, as not to be open to the objection urged by counsel. See Railroad Co. *v.* Whiteneck, 8 Ind. 217.

Our conclusion upon the whole case is that under the acts of 1885 neither in this nor in similar cases is the railway company liable, in the absence of negligence, for the injury or killing of animals going upon the track through gates at farm-crossings, whether those crossings were constructed prior to those acts or under the power given by the first section of the act of April 8, 1885, or since the passage of those acts. This conclusion renders it unnecessary for us to decide here whether or not the first section of the act of April 8, 1885, is constitutional. It may, however, be observed, in passing, in the first place, that section 5 of the act of April 13, 1885, which of itself is broad enough to exempt railway companies from liability in such cases, without reference to sections 2 and 3 of the act of April 8th, is not so connected with the first section of that act as to fail with it, if it should be held to be unconstitutional; and, in the second place, as it now seems to us, the question of the power of the land-owner to force a crossing over the track of a railway company is a question which concerns such land-owner and the railway company alone. If a land-owner should exercise the power given by that section, and construct crossings and gates as therein provided, without question by the railway company as to the constitutionality of the section, we do not see, as at present advised, how the owners of animals injured or killed at

such crossing could make the question. But, as we have concluded that, in the absence of negligence, railway companies are not liable under the other provisions of the acts of 1885, for the injury or killing of animals at farm-crossings, even though the crossings may have been constructed with their consent or by them and independent of the power given by the first section of the act of April 8th, the question of the constitutionality of that section becomes immaterial, and hence we do not decide it.

As the rulings of the court below are in accord with this opinion, the judgment is affirmed, with costs.

Private Crossings—Liability of Company.—Where a private road extends across the track and right of way of a railroad company and connects with the public highway, the company is required to maintain, across such private road, suitable fences, or provide other protection against injuries which may result from animals passing over such highway through the private road on or along the railroad track. Indianapolis, P. & C. R. Co. *v.* Thomas, 84 Ind. 194; s. c., 11 Am. & Eng. R. R. Cas. 491; Pittsburg & L. E. R. Co. *v.* Cunnington, 39 Ohio St. 327; s. c., 13 Am. & Eng. R. R. Cas. 529. However, where a railroad company has no right, by fencing in its track, to exclude proprietors from their private passage to the highway, it is not liable under statute for injury to stock. Croy *v.* Louisville, N. A. & C. R. Co., 97 Ind. 126; s. c., 19 Am. & Eng. R. R. Cas. 608; See, *post*, Pennsylvania Co. *v.* Spaulding, next case; Evansville & T. H. R. Co. *v.* Mosier, 196.

For a full discussion of the subject of private crossings, and the duties and liabilities of railroad companies thereat, see 7 Am. & Eng. Encyc. of L., tit. "FENCES," II, 2, (*d*); viii, 2, (*a*).

PENNSYLVANIA CO.

v.

SPAULDING.

(*Indiana Supreme Court, October* 12, 1888.)

Fences—Private Crossings—Liability of Company.—If a land-owner, whose lands are intersected by a railroad track, takes advantage of the Indiana statute, which authorizes him of right to construct and maintain crossings across the railroad, and imposes upon him the duty of constructing and maintaining gates thereto, the companies are not, in the absence of negligence, liable for the injuring or killing of cattle at such crossings, even though the cattle may not have been the property of the land-owner, but belonged to a third person.

Same—Cattle Guards—Obligation to Construct.—Under the said statute, a railroad company is not bound to construct and maintain cattle guards at private crossings.

APPEAL from Circuit Court, Bartholomew County.

Action to recover damages for the killing of stock belonging

to the plaintiff. Defendant appeals from a judgment for the plaintiff. The opinion states the case.

S. Stausifer for appellant.

Webster Dixon for appellee.

ZOLLARS, C.J.—Appellee's animal was killed upon appellant's railway by a train of its cars, subsequent to the taking effect of the acts of 1885, in relation to fencing railways. Acts 1885, pp. 148, 224. The animal strayed into a field of one Spurgin, whose land is separated by appellant's right of way. From there it passed to the railway through a gate at a private farm crossing, constructed for the use and benefit of Spurgin, long before the passage of the acts of 1885. After the passage and taking effect of those acts, the railway company neglected to keep the gates closed, although it had knowledge that they were left open by Spurgin. There being no wing or cross fences from the gates to the railway track, and no cattle guards across the track, the animal passed along the right of way or track for some 50 yards from the place of entry, and was there killed. The foregoing facts are substantially those stated in appellee's complaint. In addition thereto, the manner in which the railway company acquired its right of way in 1851 is stated, with the conclusion by the pleader that it was not acquired by condemnation. And so, in the answer by the railway company, the manner of acquiring the right of way is stated, substantially, as in the complaint, with the pleader's conclusion that it was by condemnation proceedings. Those matters seem to have been inserted in the pleadings upon the theory, on the part of appellee at least, that the manner in which the right of way was acquired may affect the liability of the railway company.

Facts.

No question of negligence in the killing of the animal is made. Appellee's case is based upon the ground that, as the gates were left open, the railway was not securely fenced, and that, therefore, the railway company is liable under the statutes in relation to fencing railroads. The liability of the railway company in this case, as in the recent case of Hunt *v.* Railroad Co., *ante*, 176, is dependent upon the construction, scope, and effect to be given to the acts of April 8 and 13, 1885, *supra*.

Question presented.

Appellee contends—First, that the act of April 8th is applicable only where the private crossing is over a right of way acquired by "condemnation and appropriation;" (2) that the act is applicable only to crossings constructed since it took effect; (3) that the purpose of the act was to enable adjacent land-owners, whose land is separated by the railway, to force a private crossing over

Private crossings—Liability of company.

the track, and to define the rights and liabilities of such land-owner and railway company as between them, and that it in no way affects the liabilities of railway companies to others than the persons for whose convenience such crossings may be constructed and maintained; (4) that section 5 of the act of April 13, 1885, is invalid, because not embraced in the title of the act. Appellee's counsel further states his position thus: "Even if the acts of April 8 and 13, 1885, as between the public and railway companies, relieve the company from all duty of keeping gates at private crossings closed, yet they do not repeal by any implication that portion of section 4031, Rev. St. 1881, under which it is the duty of railway companies to put cattle-guards at private crossings. In other words, if the public have, by the acts of 1885, lost the right to look to both the railway company and the land-owner to keep gates at private crossings closed, they have not lost the right to demand of railway companies that cattle-guards shall be placed at such crossings." With the exception of the last, the foregoing questions were made and argued in the case of Railroad Co. *v.* Hunt, *supra*. Those questions were examined and decided in that case adversely to appellee's contention here. With the decision in that case we are satisfied, and need not repeat what was there said. It remains to examine the last position stated by counsel.

Without determining here whether or not any portion of former statutes in relation to fencing railways is in force, notwithstanding the acts of 1885, it is sufficient for the purposes of this case to hold that it must be regarded as an assumption to say that it was the duty of railway companies under section 4031, Rev. St. 1881, to construct and maintain cattle-guards at private farm crossings. Such an inference might be drawn from the case of Railroad Co. *v.* Jones, 81 Ind. 523, but that case was explained and limited in the later case of Railway Co. *v.* Williamson, 104 Ind. 154; s. c., 23 Am. & Eng. R. R. Cas. 203.

It was there said: "What was said in that case [the Jones case], however, as to the necessity of having suitable cattle-pits at an established crossing of a railroad track, was rather of an abstract character, and had a proper reference more particularly to crossings at public highways, and to such other places on railroad tracks as are generally used as crossings with the consent of the proper railroad companies." It was further said that in the Jones case the liability of the railroad company was placed upon the ground that the gate at the crossing had not been kept closed. In the case of Bond *v.* Railroad Co., 100 Ind. 301; s. c., 23 Am. & Eng. R. R. Cas. 200, it was held, in effect, that, under the statutes, prior to those of 1885, which included section 4031, Rev. St. 1881, no duty rested upon the railway com-

panies to construct wing-fences and cattle-guards at private farm crossings. Of course to so place cattle-guards as to keep animals from the track at a private crossing would be to destroy the crossing for all purposes. And to place such guards across the track on either side of such crossing would be of no avail without fences from the guards to the fences on either side of the right of way. Such guards and fences would confine the crossing to a fixed limit, and prevent animals from straying along the track beyond it, but it is not at all certain that they would materially lessen the liability of injury or death to animals passing through the open gates. It is altogether probable that, on account of such guards and cross-fences, and the consequent want of means of escape along the side of the track, frightened animals inside the open gates might run upon the track at the crossing, and be there injured or killed. However that might be, it is certain that, under the statutes, prior to the acts of 1885, such guards and cross-fences would not exonerate the railway company from liability for the injury or death of animals going upon the track through gates at farm crossings.

In the case of Railway Co. *v.* Thomas, 84 Ind. 194; s. c., 11 Am. & Eng. R. R. Cas. 491, the railway company sought to protect itself from liability by showing that it had placed cattle-guards at the private crossing. The defence was held to be insufficient. The ground of liability in all the cases under those statutes was the failure of the railway company to maintain a secure fence, which included the keeping of gates at farm crossings closed, and not the want of cattle-guards or cross-fences. Railway companies were held bound to keep their rights of way securely fenced, and to thus keep animals from their tracks. If they neglected to do so, and animals passed to the track through insecure fences, or open gates at farm crossings, and were there injured or killed, the companies were held liable, except to the owner for whose benefit the crossing was maintained, without any reference to what may have been done in the way of placing cattle-guards or cross-fences at such crossings. The duty to fence the right of way of railway companies has been, and now is, a purely statutory duty. Under former statutes, that duty resulted from the liability imposed by those statutes. The duty, therefore, extended to nothing except what was necessary to escape that liability. That being so, it would seem to follow that, as the construction and maintenance of cattle-guards and cross-fences at private farm crossings would not exonerate railway companies from liability for the injury or killing of animals upon the track at such crossings, there was no duty resting upon them to construct or maintain such guards and fences.

No duty to construct cattle guards at private crossings.

By the statutes of 1885 (Acts 1885, pp. 148, 224), the duty

of fencing portions of their tracks, as therein specified, including all places where farm gates and crossings could be of service to any one, is positively enjoined upon railway companies. As we have said, that duty is purely a statutory duty. Railway companies might have escaped, and may still escape, the liability imposed by the several statutes by performing the duty as the statutes required, and still require, and they could not and cannot escape it in any other way. The statutes here at no time required cattle-guards and cross-fences to be placed at private crossings. They have been enacted and construed upon the theory that gates at such crossings should be kept closed, so as to prevent the ingress of animals to the railway tracks; that, when thus closed, there is no need of cattle-guards and cross-fences at such crossings; and that the construction and maintenance of them by railway companies at such crossings will not exonerate them from whatever liability there may be for the injury and killing of animals that go upon the track through the open gates. Under the act of 1885, the duty on the part of railway companies to fence the specified portions of their tracks does not result from the liability prescribed, as under former statutes, but the liability is fixed for a neglect of the duty positively enjoined. Under former statutes there was no duty where there was no liability. Under the acts of 1885 there is no liability where there is no duty. As already stated, by those acts, the duty of fencing their tracks as therein specified is positively enjoined upon railway companies. Those acts, however, transfer from the railway company, to the land-owner for whose convenience private farm crossings are maintained, the duty of keeping the gates at such crossings closed. Section 5 of the acts of April 13, 1885, provides that all gates and bars at farm crossings shall, in the absence of a contract or agreement to the contrary, be constructed and maintained and kept closed by the owner of such crossing. Sections 2 and 3 of the act of April 8, 1885, makes it the duty of the land-owner, for whose benefit the crossing is maintained, to keep the gates closed, and exonerate the railway company from liability, except where the injury or killing of animals is caused by the negligence of its servants. Those acts no more require cattle-guards and cross fences at private farm crossings than did the former statutes. It was not contemplated, in the passage of the acts, that gates at such crossings shall be left open, although the duty of keeping them closed is transferred from the railway company to the land-owner for whose benefit they may be maintained. If kept closed, as it is contemplated they shall be, there will be no need of cattle-guards and cross-fences at the crossing. If left open by the land-owner, such guards and fences would not prevent injury to animals upon the crossing. Cattle-guards and

cross-fences were held to be necessary under former statutes, and are required by the acts of 1885 to be placed at public roads and highway crossings. The reason of that requirement is that, at such open and public crossings, there is no other way of preventing the ingress of animals to portions of the railroad not so crossed by the public, and required to be fenced. That reason cannot obtain where a private crossing is inclosed by gates. Upon the whole case, our conclusion is that, upon the facts pleaded, the railway company is not liable, and that, therefore, the court below erred in overruling the appellant's demurrer to appellee's complaint.

The judgment is reversed at appellee's costs, and the cause is remanded, with directions to the court below to sustain appellant's demurrer to the complaint.

Private Crossings.—As to private crossings and the duties and liabilities of railroad companies thereat, see, *ante*, Hunt *v.* Lake Shore & M. S. R. Co., 176, and note, 184; *post*, Evansville & T. H. R. Co. *v.* Mosier, 196.

Cattle-Guards.—In the absence of statute there is no obligation on the part of the railroad company to maintain cattle-guards (see, *ante*, note to Johnson *v.* Chicago & N. W. R. Co., 132–134), and in the absence of contract or charter of obligations in respect thereto, such duty will not be implied from the fact that the company has constructed them along the line of the road where it enters and leaves cultivated fields unless the lapse of time has raised the presumption of a grant or covenant. See Ward *v.* Paducah & M. R. Co. (Tenn.), 4 Fed. Rep. 862. But where the statute imposes upon a railroad company the duty to fence its track, it also imposes upon it the obligation of making and keeping in repair suitable cattle-guards. See Louisville, N. A. & C. R. Co. *v.* Porter Township, 97 Ind. 267; s. c., 20 Am. & Eng. R. R. Cas. 446; White Water R. Co. *v.* Bridgett, 94 Ind. 216; s. c., 20 Am. &. Eng. R. R. Cas. 443; Pittsburgh, C. & St. L. R. Co. *v.* Eby, 55 Ind. 567; Indianapolis & C. R. Co. *v.* Kibbey, 28 Ind. 480; Indianapolis, P. & C. R. Co. *v.* Irish, 26 Ind. 268; New Albany & S. R. Co. *v.* Pace, 13 Ind. 411; Louisville, N. A. & C. R. Co. *v.* Spair, 61 Iowa, 467; Mundhenk *v.* Central Iowa R. Co., 57 Iowa, 718; s. c., 11 Am. & Eng. R. R. Cas. 463; Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337; s. c., 13 Am. & Eng. R. R. Cas. 540; St. Louis, W. & W. R. Co. *v.* Curl, 28 Kan. 622; s. c., 11 Am. & Eng. R. R. Cas. 458; Union Pac. R. Co. *v.* Harris, 28 Kan. 206; s. c., 11 Am. & Eng. R. R. Cas. 431; St. Louis & S. F. R. Co. *v.* Shoemaker, 27 Kan. 677; s. c., 11 Am. & Eng. R. R. Cas. 379; St. Louis & S. F. R. Co. *v.* Sharp, 27 Kan. 134; s. c., 13 Am. & Eng. R. R. Cas. 595; St. Louis & S. F. R. Co. *v.* Edwards, 26 Kan. 72; s. c., 7 Am. & Eng. R. R. Cas. 547; Watier *v.* Chicago, St. P. M. & O. R. Co., 31 Minn. 97; s. c., 13 Am. & Eng. R. R. Cas. 582; Clary *v.* Burlington & M. R. Co., 14 Neb. 232; s. c., 11 Am. & Eng. R. R. Cas. 493; Fremont, E. & M. V. R. Co. *v.* Lamb, 11 Neb. 592; s. c., 5 Am. & Eng. R. R. Cas. 367; Railroad Co. *v.* Newbrander, 40 Ohio St. 15; s. c., 11 Am. & Eng. R. R. Cas. 480; Lake Shore & M. S. R. Co. *v.* Sharpe, 38 Ohio St. 150; s. c., 7 Am. & Eng. R. R. Cas. 543; Texas & St. L. R. Co. *v.* Young, 60 Tex. 201; s. c., 13 Am. & Eng. R. R. Cas. 544; Dunnigan *v.* Chicago & N. W. R. Co., 18 Wis. 28.

In Streets of Towns and Villages.—Where cattle-guards can be constructed in the streets of a town or village without interfering with ordinary traffic, the company is required to construct and maintain them. See

Indianapolis, P. & C. R. Co. *v.* Lindley, 75 Ind. 426; s. c., 14 Am. & Eng. R. R. Cas. 495; Toledo, W. & W. R. Co. *v.* Owen, 43 Ind. 405; Jeffersonville, M. & I. R. Co. *v.* Parkhurst, 34 Ind. 501; Toledo, W. & W. R. Co. *v.* Howell, 38 Ind. 447; Madison & I. R. Co. *v.* Kane, 11 Ind. 375; Flint & P. M. R. Co. *v.* Lull, 28 Mich. 510; Tracy *v.* Troy & B. R. Co., 38 N. Y. 433; Bradley *v.* Buffalo, N. Y. & E. R. Co., 34 N. Y. 427; Brace *v.* New York C. R. Co., 27 N. Y. 269; Cleveland & P. R. Co. *v.* McConnell, 26 Ohio St. 57; Hayes *v.* Michigan C. R. Co., 111 U. S. 228; bk. 28, L. ed. 410; s. c., 15 Am. & Eng. R. R. Cas. 394.

In those cases, however, where such constructions would interfere with or impede the free use of the streets by the public, the railroad company is not required to maintain them. See Peoria, P. & J. R. Co. *v.* Barton, 80 Ill. 72; Towns *v.* Cheshire R. Co., 21 N. H. 363; Parker *v.* Rensselaer & S. R. Co., 16 Barb. (N. Y.) 315; Vanderker *v.* Rensselaer & S. R. Co., 13 Barb. (N. Y.) 390; Crawford *v.* New York C. R. Co., 18 Hun (N. Y.), 100; Halloran *v.* New York R. Co., 2 E. D. Smith (N. Y.) 257.

For full discussion of the obligation of railways to construct and maintain cattle-guards at crossings and in cities, see 7 Am. & Eng. Encyc. of L., tit. FENCES, II, 2, (*d*), iii.

ATCHISON, TOPEKA AND SANTA FÉ R. CO.

v.

MILLER.

(*Kansas Supreme Court, June* 9, 1888.)

Opinion Evidence—Non-experts—Competence.—Witnesses not shown to be experts may, nevertheless, testify to facts, although such facts appear to be opinions or conclusions of facts, if the subject-matter to which their testimony relates cannot be reproduced or described to the jury as it appeared to the witnesses at the time of its occurrence, and such opinions are founded upon facts such as men in general are capable of comprehending and understanding.

Killing Stock—Crossings—Duty of Company.—Where a railroad is constructed across a public highway, it is the duty of the railroad company to construct road crossings and approaches thereto, so as not to materially impair its usefulness; and where stock are killed at such public road crossing, which injury is claimed to be caused by reason of a defective crossing, and the court instructs the jury that it is the duty of the company to construct good, sufficient, and safe crossings, *held*, such instruction not error.

Instructions—Evidence—Prejudicial Error.—Where evidence at a trial is admitted, upon which instructions are given to the jury, both evidence and instructions being competent if founded upon proper pleadings, but such issue not being raised by the pleadings, *held*, such evidence and instructions erroneous; but *further held*, that where from the whole record such evidence and instructions do not seem to have influenced or af-

fected the verdict, such error is not sufficient to require a reversal of the case.

ERROR to District Court, Lyon County.

Action by Adam Miller against the Atchison, Topeka & Santa Fé R. Co. to recover the value of certain cattle killed by the defendant in the operation of its trains. Defendant brings error to review a judgment for plaintiff.

Geo. R. Peck, *A. A. Hurd*, and *C. N. Sterry* for plaintiff in error.

Cunningham & McCarthy for defendant in error.

CLOGSTON, C.—This was an action to recover for the loss of three head of cattle killed by the defendant in the operation of its road. The injury complained of occurred on a highway where it crossed the defendant's track, the land on either side of the highway and the railroad being fenced. The only controversy is as to the liability of the company for the killing of one heifer, no error being alleged as to the recovery for the other two animals. The record shows that on August 7, 1884, the west-bound passenger train of the defendant ran into a herd of cattle belonging to the plaintiff, and knocked one heifer off the track, from which injury she died. The negligence sought to be shown against the railroad company was: First, that no whistle was sounded at the whistling-post, 80 rods east of the crossing; second, that no attempt was made to stop the train after the heifer went upon the track; third, that the approaches to the crossing were improperly constructed by making the roadway too narrow, and that the cattle-guards were placed in the road-way, thereby reducing the width of the crossing, and making said roadway and crossing more difficult of passage for the plaintiff's cattle. The injury complained of was witnessed by two persons, a Mr. Mason and a Mrs. Jennings, both of them being about a quarter of a mile from the crossing. These witnesses testified that the whistle was not sounded, and that they were satisfied that it was not; that they were in a position to have heard it if it had been sounded. This evidence was admitted over the objection of the defendant. Defendant now insists that this evidence was erroneously admitted, for the reason that it called for the opinions of the witnesses, or conclusions, and not facts; that where once the situation of the parties is shown, the distance and surrounding circumstances, it is then for the jury to determine whether or not the witnesses could have heard any whistle if one had been sounded. Numerous authorities have been cited to support this theory, but upon examination we are of the opinion that they are not applicable to the facts of this case. The testimony objected to, in

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Opinion evidence—Non-experts—Competency.

our opinion, is more in the statements of the facts than in the opinion of the witnesses. It is true that these facts are based upon the judgment and observation of the witnesses, but they are such observations as are made by men of ordinary intelligence, without any special knowledge, learning, or skill. But even if it was the opinion of the witness, and not a fact about which he was testifying, still we think it was such an opinion as falls within the exception of the general rule. The very nature of the circumstances about which they were testifying, with the surroundings, condition of the atmosphere, wind, organs of hearing, obstructions, and a host of other incidents that could not be portrayed to a jury in such a manner as to enable them to draw a conclusion from the facts. It was said in Com. *v.* Sturtivant, 117 Mass. 133: "The exception to the general rule that witnesses cannot give opinions, is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury." So, also, in State *v.* Shinborn, 46 N. H. 501, it was held to be "admissible on the ground that it came within that class of cases where evidence is received from necessity, arising from the impossibility of stating those minute characteristics of appearance, sound, and the like, which, nevertheless, may lead the mind to a satisfactory conclusion, and be reasonably reliable in judicial investigations." This court also has held, in City of Parsons *v.* Lindsay, 26 Kan. 432, that "there are also some exceptions, seemingly founded upon convenience or necessity, and relating to such matters as involve magnitudes or quantities, or portions of time, space, motion, gravitation, or value, and such as involve the condition or appearance of objects, as observed by the witness, and matters which, from their limitless details, and the infirmity of language and memory, cannot well be stated by the witness, except in the form of an opinion." See also Parker *v.* Steamboat Co., 109 Mass. 449; State *v.* Knapp, 45 N. H. 148; Campbell *v.* State, 23 Ala. 44; Abb. Tr. Ev. 587. In the admission of this evidence we see no error.

The second objection urged is to the instruction of the court, which instruction is as follows: It is the duty of the company to furnish employees with good and sufficient appliances to the safe operation of their trains, and a failure to furnish their trains with adequate appliances is negligence upon the part of the company; but the omission to do so would make no difference in a case like this, if the accident complained of could not have been prevented

Killing stock —Duty of company as to appliances and crossings.

even with the best appliances. This instruction was founded upon the evidence given by the engineer, who was in charge of the engine at the time of the injury complained of. He testified that the air-hole was blown off, and for that reason he was unable to use the air-brakes in attempting to stop the train, and that they could only use the ordinary brakes of the train, which required a longer time to bring the train to a stop than if air-brakes were used. But this witness, in addition, testified that if the train had been equipped with the best air-brakes and appliances it would have been impossible for him to have stopped the train in time to prevent the injury. This witness was the only one who testified to any defect in the engine or brakes, and there was no evidence to contradict his testimony; therefore, while perhaps the bill of particulars was not broad enough to have warranted the evidence or the instruction given by the court, where the evidence upon which the instruction was given is not disputed or contradicted, we cannot see how this evidence or instruction could in any manner prejudice the defendant with the jury. The court also instructed the jury that "it is made the duty—made so by statute—of the railroad company to construct good and sufficient and safe crossings at all points where a railroad crosses a highway." This was complained of for the reason, as urged by the defendant, that it was imposing a duty upon the company not imposed upon it by any statute or regulation in force in this State. The statute makes it the duty of a railroad company to restore the highway intersected by its railroad to its former state, or to such a state as to not unnecessarily impair its usefulness. Section 47, c. 23, Comp. Laws 1885. Other statutes require railroad companies at all crossings of public roads to construct and keep in repair a good and sufficient crossing by securing on each side of the rails a board not less than 12 feet long, not less than 10 inches wide, and 2 inches thick, and fill the place with gravel and stone. The evidence shows that at the point of this crossing the track was some 8 or 10 feet above the level of the surrounding lands, and that the approaches to the crossing were about 8 feet wide, and that the cattle-guards were placed some distance in the road, both to the east and west of the crossing, making the cross-way much narrower than that of the public road. The engineer testified that the cattle killed were not seen by him until just as the engine reached the crossing, when they went upon the track, and that the reason why he could not see the cattle was that they were hid by the embankment made by the approach to the road. Other witnesses testified that quite a number of cattle were on the track for some time before the train reached the crossing. The evidence was that the cattle were crossing from one side of the track to the other. The width of the crossing,

the distance between cattle-guards, the nature of the embankments, were all given to the jury; and while the language of the instruction followed a statute that has been held by this court to be unconstitutional, yet the duty imposed upon the defendant was to construct at least a reasonably safe crossing. If they failed in this, and the general usefulness of the highway was impaired, and by reason of its impaired usefulness the cattle were prevented from crossing as readily as they otherwise would, the defendant would be liable. This question, we think, was properly submitted to the jury. And even if we are mistaken in this, yet the evidence in this case shows such other negligence on the part of the defendant, such as failing to whistle at the whistling post, 80 rods east of the crossing, the fact that the cattle-guards were in the road, and thereby obstructed a part of the public highway, would have warranted the jury in their verdict, independent of the question as to the condition of the approaches to the crossing. For these reasons we do not believe that the judgment ought to be disturbed, even if the instructions of the court in the last respect were somewhat erroneous. It is therefore recommended that the judgment of the court below be affirmed.

PER CURIAM.—It is so ordered; all the justices concurring.

Killing Stock—Evidence.—See, *ante*, Union Pac. R. Co. *v.* Blum, 119, and note, 121.

Public Crossings.—For full discussion of the question of the liability of railway companies for killing animals at public crossings, see 7 Am. & Eng. Encyc. of L., tit. "FENCES," II, 2, (*d*), VIII, 1, (*b*).

Opinion-evidence.—For a discussion of the question of the admissibility of opinion-evidence, see, *post*, Texas & Pac. R. Co. *v.* Virginia Ranch, Land & Cattle Co.

WAIT

v.

BURLINGTON, CEDAR RAPIDS AND NORTHERN R. CO.

(*Iowa Supreme Court, March* 12, 1888.)

Killing Stock—Open Gate—Negligence—Province of Jury.—In an action to recover double damages for the killing of stock, if the evidence tends to show that the stock passed through a gate in the railroad fence, which had been open for about thirty-six hours before the accident, what constitutes the proper exercise of care, and whether a failure to inspect the gate for three or four days or for a longer or shorter time is negligence, or whether the gate being open for thirty-six hours, will raise a presumption

of negligence against the company, are matters for the determination of the jury.

APPEAL from District Court, Keokuk County.

Action by W. H. Wait against the Burlington, Cedar Rapids & Northern R. Co. to recover double damages for the killing of certain colts belonging to the plaintiff. Defendant appeals from a verdict and judgment for the plaintiff. The case is stated in the opinion.

S. K. Tracy and *Boal & Jackson* for appellant.

MacKey & Fonda and *G. S. Woodin* for appellee.

BECK, J.—1. The evidence presented in the abstract shows that the plaintiff's colts, killed by defendant's train, escaped and went upon defendant's railroad track. There is evidence tending to show that they passed through a gate in the railroad fence which appears to have been open at the time, and that it had been open for about 36 hours before the accident, which occurred early in the morning, or latter part of the night. The testimony also tends to show that the gate was not known to be closed for several days prior to the accident, and that the section hands in charge of the road at that place were not required to pass over it more frequently than once a week, and their custom was to pass over it no oftener. Facts.

2. It is insisted by defendant's counsel that as there was no proof tending to show actual knowledge on the part of defendant that the gate was open, the evidence fails to support the verdict. It is also insisted by counsel that the gate was not shown by the evidence to have been open for a length of time which would raise a presumption that it was known to the defendant. The defendant was required to exercise due care to keep its gate closed, and to obtain knowledge of its condition,—that is, whether it was closed or open. If it failed to exercise such care, and through its negligence remained ignorant of the fact that the gate was open, it will be chargeable as having knowledge of that fact, which due care would have given it. Now, what constitutes the proper exercise of care, and whether a failure to inspect the gate for three or four days, or for a longer or shorter time, is negligence, or whether the gate's being open for 36 hours will raise a presumption of negligence against defendant, and charge it with the knowledge that the gate was open, are matters for the determination of the jury. Perry *v.* Railway Co., 36 Iowa, 102; Bell *v.* Railway Co., 64 Iowa, 321, 20 N. W. Rep. 456. It was the duty of defendant to close the gate after gaining knowledge that it was open, whether it was left open by defendant's employees or by others. Aylesworth *v.* Railway Co., 30 Iowa, 459; Perry *v* Railway Co., *supra;* Davis *v.* Railway Co., 40 Iowa, 292. The Open gate—Province of jury.

district court rightly submitted the questions in the case involving defendant's liability upon all the facts disclosed by the evidence to the determination of the jury.

3. The jury were instructed in harmony with the doctrines we have stated, and instructions refused were in conflict therewith. There was no error in giving and refusing the instructions.

These views dispose of all questions in the case. The judgment of the district court is affirmed.

Killing Stock—Gates in Fences.—For a full discussion of the liability of railway companies for injuries to stock resulting from negligently leaving open or unfastened gates in railway fences, see, *ante*, Payne *v.* Kansas City, St. J. & C. B. R. Co., 113, and note, 117–119.

EVANSVILLE AND TERRE HAUTE R. CO.

v.

MOSIER.

(*Indiana Supreme Court, May* 11, 1888.)

Fences—Private Crossing—Gate—Duty of Company.—Although a railroad company has erected a gate and constructed a private crossing for the convenience of the land-owners, it is under no obligation either by statute or from an implied contract to keep the gate in proper repair or to keep it closed.

APPEAL from Circuit Court, Knox County.

Action to recover damages for the killing of two colts. The opinion states the case.

Asa Iglehart, *John E. Iglehart*, and *Edwin Taylor* for appellant.

Thomas R. Cobb and *Orlando H. Cobb* for appellee.

MITCHELL, Ch. J.—Mosier recovered judgment against the appellant railroad company for the value of two colts killed by the company's cars on its track, upon which the animals entered on the morning of the 22d day of August, 1883. The evidence shows, without dispute, that the animals escaped from the inclosure in which they were pasturing, through a gate at a private crossing, which led from a public highway over the company's right of way and track to some inclosed pasture lands. The inclosure embraced a tract of land comprising 135 acres, which, although owned in separate parcels by the plaintiff and four others, was surrounded by a common

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fence, and was used as a common pasture by the several owners. There were two private crossings leading over the company's right of way to the pasture,—one at the north, and the other at the south, end of the tract. The plaintiff habitually used the south gate, but, on the occasion in question, his animals passed out through the north gate, on to the railway track.

The company erected and maintained the gates at the crossings, and, when the gates were closed and properly fastened, the road was securely fenced. The fastening on the north gate had become so far defective that, unless adjusted with care by persons passing through, the gate was liable to be blown open, or it might be opened by animals coming in contact with it. This was known to at least one of the land-owners, but it does not appear to have been known to the company or its agents; the crossings having been used, so far as appears, exclusively by the owners of the pasture land.

There was no evidence tending to show the agreement under which the gates had been erected, nor did it appear that the company had agreed with the land-owners to keep the gates shut, or maintain them in repair. The section foreman, whose duty it was to pass over and keep that portion of the track and the adjacent fences in repair, observed the condition of the gates the evening before the animals were injured. He saw that the north gate was slightly sagged, as it had been for some time before, but it was then closed, and apparently in a safe condition.

Relevant to the evidence as thus summarized, the court charged the jury substantially that, if they found from the evidence that the gate, through which the animals escaped, was kept up for the convenience and benefit of the several land-owners, or some of them, in using a private crossing over the railroad from the pasture to the public highway, and if they should further find that, with reasonable care in securing the fastening of the gate when shutting it, the gate was sufficient to prevent the escape of stock, and was usually kept closed, then their verdict should be for the defendant. In this instruction the court presented to the jury the theory or condition upon which they might exonerate the defendant from liability.

They were instructed, in effect, that although the gate may have been erected for the convenience and benefit of the land-owners, yet, under the law, the exoneration of the railway company depended upon whether or not it had provided the gate with such fastening as would, with reasonable care, be adjusted so as to make it secure, or whether or not the company usually kept the gate closed. The charge was capable of no other construction,

Duty of company as to gate at private crossing.

and must have been so understood by the jury. This statement of the law was inaccurate, and it must have misled the jury to the injury of the appellant. Upon the former appeal of this case, Evansville & T. H. R. Co. *v.* Mosier, 101 Ind. 597; s. c., 22 Am. & Eng. R. R. Cas. 569, the rule governing cases of this class was stated explicity, to the effect, that "the duty to fence is not owing to one who has undertaken to maintain the fence, nor to one for whose benefit the private crossing is maintained."

Persons for whose convenience railroad companies erect or maintain gates at private crossings, assume the risk of all increased danger to their property which may result from having gates instead of fences. Wabash R. Co. *v.* Williamson, 104 Ind. 154; s. c., 23 Am. & Eng. R. R. Cas. 203; Bond *v.* Evansville & T. H. R. Co., 100 Ind. 301; s. c., 23 Am. & Eng. R. R. Cas. 608.

The land-owner for whose benefit a private crossing is maintained, and who is supposed to be fully cognizant of the condition of the gates and of the uses to which it is put, must therefore, as between himself and the company, see to it that the gate is in proper condition, and that it is kept closed. He has no right to expect that the railroad company, unless it has expressly contracted to do so, will erect gates for his exclusive use, and also keep watch over them and keep them closed. Louisville, N. A. & C. R. Co. *v.* Goodbar, 102 Ind. 596; Fort Wayne, C. & L. R. Co. *v.* Woodward, 112 Ind. 118; s. c., 31 Am. & Eng. R. R. Cas. 546.

In respect to the appellant's insistance that the evidence does not sustain the verdict, it is sufficient to say it has not been pointed out to us, nor are we able to discover wherein the evidence is in any manner substantially different from what it was when the case was appealed before. We were constrained to reverse the judgment then for want of sufficient evidence. We should necessarilly arrive at the same conclusion again were we not compelled to reverse for the error in giving the instruction above mentioned.

It is contended that, because the railroad company erected the gates and constructed the crossing some fifteen years ago, it impliedly came under a contract to maintain the gates in repair and closed as if they had not been erected for the appellee's convenience. We do not assent to this view. The evidence shows nothing more than that the crossings and gates were constructed by the railroad company, and that they were used exclusively by the owners of the land. It cannot be implied that the railroad company came under an obligation to keep the gates closed.

The only answer filed by the railroad company in the court below, was the general denial. The appellee now contends that

the defence that the animals entered upon the railroad track through a gate at a private crossing was a special defence, and that the evidence in relation to that matter was not admissible under the general denial. We are asked to determine whether, under the issues, the evidence was properly admitted. It is sufficient to say, in respect to this matter, that, although the appellee objected to the evidence, it was admitted, and there being no cross-error assigned, no question in relation thereto is presented by the record.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

Private Crossings.—See, for a full discussion of the liability of railways at private crossings, *ante*, Hunt *v.* Lake Shore & M. S. R. Co., 176; Pennsylvania Co. *v.* Spalding, 184, and note 189.

Gate in Railway Fence.—Regarding gate in railway fences, and the liabilities of railroad companies regarding, see, *ante*, Payne *v*, Kansas City, St. J. & C. B. R. Co., 113, and note 117–119.

KENTUCKY CENTRAL R. CO.

v.

KINNEY.

(*Kentucky Court of Appeals, April* 28, 1888.)

Killing Stock—Limitation of Action—Charters.—A railroad was constructed under a charter which contained no special limitation of actions against it. Thereafter it was acquired by another company, whose charter prescribed a limitation of actions for injuries to live-stock of six months. Subsequently a third company acquired the road. In an action to recover damages for the killing of live-stock, *held* that in the absence of evidence showing the manner in which the company in possession acquired title, it must be presumed that it was operating the road under the charter of the company by which it was constructed, and that therefore the limitation of six months, prescribed by the charter of the second company, did not apply.

APPEAL from Circuit Court, Bourbon County.

Action by William Kinney against the Kentucky Central R. Co. to recover damages for the killing of a cow belonging to the plaintiff. The railroad upon which the cow was killed had been constructed and operated by the Maysville and Lexington R. Co., but at the time of the injury was operated and controlled by the defendant company. The defendant was so operating the road as successor to the Covington & Lexington

R. Co., and the charter of the latter company contained a provision which required that all actions for injuries to live-stock should be brought within six months after the injuries. The defendant company pleaded this provision in defence, but the court held that the road was being operated under the charter of the Maysville & Lexington R. Co., and accordingly rendered judgment for the plaintiff. The defendant appeals.

G. C. Lockhart for appellant.

McMillan & Talbott for appellee.

LEWIS, J.—It seems to be conceded in argument that the railroad from Paris to Lexington passing over the land of the appellee was originally constructed and owned by the Maysville & Lexington R. Co. But although the road between those two points was, at the time appellee's cow was killed, and now is, in the possession of appellant, the Kentucky Central R. Co., it does not appear in what manner, or upon what terms it was acquired, whether by lease or purchase; nor does it make any difference, for, in the absence of evidence to the contrary, it must be presumed the road is now operated under the authority conferred by the charter incorporating the original company and owner, and subject to the terms and conditions therein prescribed. And the fact that the Maysville & Lexington R. Co. still has a corporate existence shows it retains and has an interest in the road, and that the provisions of its charter govern and regulate the operation of the road. It may be, and doubtless is, true that the possession and control of the road by appellant is legal, and exists in virtue of statutory enactment; but it does not follow,—any more than it would if an individual had become the owner or lessee,—that the original charter has been repealed, and the conditions and restrictions under which it was intended the road should be operated have been abrogated. In our opinion, therefore, the provision in the charter incorporating the Covington & Lexington R. Co., under which appellant claims title, prescribing the limitation of six months within which an action for killing cattle may be commenced, does not apply to the road from Paris to Lexington, but such action may be maintained if commenced within one year from the time the cause arose. As the lower court so ruled, and no other ground for reversal is made, the judgment is affirmed.

Road operated under charter of original company.

TEXAS AND PACIFIC R. CO.

v.

VIRGINIA RANCH, LAND AND CATTLE CO.

(*Texas Supreme Court, October* 28, 1887.)

Corporation—Pleading—Petition—Incorporation.—Under the Texas statutes which declares that in pleading the charter or act of incorporation of a railroad company it should be sufficient to allege that such company was duly incorporated, an allegation in a petition that the plaintiff is "a body duly and legally incorporated by and under the law of the State of Texas" is sufficient.

Killing Stock—Pleading and Proof—Variance.—Although a petition alleges that stock was injured in March, the fact that the evidence shows that the animal was injured in August is immaterial.

Same—Opinion Evidence—Competency of Witnesses.—In an action to recover damages for injuries to an animal belonging to the plaintiff, witnesses who have had much experience in the business for which such animals are used can competently testify as to its value.

APPEAL from District Court, Callahan County.

Action to recover damages for the killing of a jack belonging to the plaintiff. The opinion states the case.

ACKER, J.—The Virginia Ranch, Land & Cattle Company brought this suit in the district court of Callahan county against the Texas & Pacific R. Co., to recover $800, the value of a jack alleged to have been killed by defendant company's locomotive and train. It is alleged in the petition that plaintiff company is "a body duly and legally incorporated by and under the laws of the State of Texas." Defendant company answered, by general exception, special exception that "the manner of plaintiff's incorporation is not set out in the petition," and general denial. The case was tried by jury October 21, 1885, and resulted in verdict and judgment in favor of plaintiff for $400. Motion for new trial was overruled, and defendant appealed. **Case stated.**

Appellant's assignment of error contains seven grounds, but three of which are presented in its brief. The others are, therefore, regarded as abandoned. Rule 29 of the supreme court.

Appellant insists upon the first, sixth, and seventh grounds of error assigned, which are as follows: "(1) The verdict is contrary to the evidence in this: that none of the witnesses for plaintiff qualified themselves to testify as to the value of the jack, and the evidence as to his value did not justify the jury in finding a verdict for plaintiff for **Grounds of error.**

any amount." "(6) The court erred in overruling plaintiff's exception to defendant's petition upon the ground that the manner of its incorporation is not set out in the petition. (7) The verdict of the jury is unsupported by the evidence in this: that no part of plaintiff's testimony showed, or tended to show, that plaintiff ever had a jack hurt, injured, or killed, on or about the 14th of March, 1884, the time alleged in the petition."

The court did not err in overruling appellant's exception to appellee's petition. Acts 18th Leg. (Gen. Laws 1883, p. 103).

There is nothing in the seventh ground of error. It is true that the proof shows that the animal was injured in August, instead of March, as alleged in the petition, but we think this is of no consequence.

It was proven that the animal possessed superior qualities; that his value was at least as much as the amount awarded by the jury. Several witnesses, who testified that they had had much experience in the business for which such animals are used, placed his value at from four to twelve hundred dollars. No witness contradicts them. The animal died in December, after he was injured in August. It appears from the evidence that one of his legs was broken, his shoulder "mashed in," and his head bruised. The court submitted to the jury the questions whether the animal was injured by defendant company, and, if so, whether such injury was the proximate cause of his death. The jury found for the plaintiff, and we cannot say that the verdict is clearly wrong.

Evidence—Opinion as to value.

We think there in no error in the judgment of the lower court, and it is our opinion that it should be affirmed.

WILLIE, C.J.—Report of commissioners examined, their opinion adopted, and judgment affirmed.

Opinion Evidence.—It is a general rule that the opinion of non-professional witnesses are not admissible in evidence, except few, under peculiar circumstances. See Mobile, etc., Ins. Co. *v.* McMillan, 31 Ala. 711; Berry *v.* State, 10 Ga. 511; Spear *v.* Richardson, 34 N. H. 428; Robertson *v.* Stark, 15 N. H. 109; Gibson *v.* Williams, 4 Wend. (N. Y.) 320; Zachary *v.* Swanger, 1 Oreg. 92; Carr *v.* Northern Liberties, 34 Pa. St. 324; Lester *v.* Pittsford, 7 Vt. 161.

The exceptions to the rule spoken of are those instances where the opinion is founded on the personal observation of the witness (Siddleman *v.* Beckwith, 43 Conn. 9) regarding a matter in which he has had experience. Thus it has been held, that the opinion of persons familiar with highways and their use, concerning the safety or convenience of passage, is competent testimony in an action for damages for an injury caused by an obstruction of the highway. Laughlin *v.* State Railroad of Grand Rapids, 62 Mich. 220; s. c., 26 Am. & Eng. R. R. Cas. 377. But it has been held in the case of Couch *v.* Charlotte Col. Ang. R. Co., 22 S. C. 577; s. c., 28 Am. & Eng. R. R. Cas. 331, that a witness who knows the

position and character of an open water-way across a railroad track cannot competently state their opinion of the dangerous character of the place, and of the requirement of prudence that notice should be given to one pushing a hand-car over it.

Opinion as to Value.—Persons familiar with the particular class of property are often permitted to give their opinion, although their knowledge is not the results of particular class of any branch or department of science. See Wyman *v.* Lexington & W. C. R. Co., 13 Metc. (Mass.) 316; Swan *v.* Middlesex, 101 Mass. 173. But in such case some foundation must always be laid for the introduction of the opinion of such witness, by showing that he has had the means to form an intelligent opinion from an adequate knowledge of the nature and kind of property in controversy, or of its value (see Whitney *v.* City of Boston, 98 Mass. 315; Woodruff *v* Imperial Fire Ins Co., 83 N. Y. 133; Judson *v.* Easton, 58 N. Y. 664; Bedell *v.* Long I. R. Co., 44 N. Y. 367); and it must be shown that the witness has the knowledge of the value of the article at the particular market in question, Greely *v.* Stillson, 26 Mich. 153. It is not always necessary that the witness should himself be conversant with the value; he may have ascertained it from persons who are conversant with property of that nature after they are made acquainted with their condition by the testimony of others. See Toledo & W. R. Co. *v.* Smith, 25 Ind. 288; Orr *v.* Mayor, 64 Barb. (N. Y.) 106.

Opinion as to Damages.—It is not permissible for a witness to give his opinion as to the amount of damage in the particular case; the witness must state the facts and the jury will estimate the damages. Bissell *v.* West, 35 Ind. 54; Central R. Co. *v.* Senn, 27 Am. & Eng. R. R. Cas. 304; Houston, etc., R. Co. *v.* Burke, 9 Ib. 59; Fremont, etc., R. Co. *v* .Whalen, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364. But the witness may give his opinion as to the value of the property before and after the injury, and thus practically testify to the amount of damage done. Norman *v.* Wells, 17 Wend. (N. Y.) 138; Paige *v.* Hazard, 5 Hill (N. Y.), 603; Morehouse *v.* Matthews, 2 N. Y. 514.

In some cases, however, the witness is permitted to express his opinion as to the damage sustained in all cases, where the amount of the value of the property is not in issue. Shattauch *v.* Stoneham Branch, 66 Mass., 46 Allen 116, 117. See also Miss. Bridge Co.*v.* Ring, 58 Mo. 492. The tendency of some cases is to allow witnesses to express their opinion as to the amount of damage in all cases where value of the property is in question. See Sexton *v.* North Bridge Water, 116 Mass. 200; Snow *v.* Boston & M. R. Co., 65 Me. 230; Carter *v.* Thurston, 58 N. Y. 104; Rochester & S. R. Co. *v.* Budlong, 10 How. Pr. (N. Y.) 289.

In Wichita & W.R. Co. *v.* Kuhn (Kan.), 33 Am. & Eng. R. R. Cas. 159, it was held that in condemnation proceedings a witness, without testifying either as to specific valuation or as to specified facts, may not estimate damages by taking into consideration all losses, inconvenience and damages which may reasonably be accepted or shown to exist through the maintenance of a railroad track to be continued permanently; and in the case of the Columbus, H. V. & T. R. Co. *v.* Gardiner (Ohio), 32 Am. & Eng. R. R. Cas. 243, in an action by the owner of property abutting on the public line of the municipal corporations, which was occupied by the railroad track, to recover of the railroad companies damages for injuries to such property by the laying of the track, it was held opinion evidence as to the damages suffered by abutting property owners by reason of the construction of the railroad in the street, was inadmissible.

For a full discussion of the question of the admissibility as evidence of the opinion of persons other than expert witnesses, see 7 Am. & Eng. Encycl. of L., tit. EXPERT AND OPINION EVIDENCE.

VOLKMAN

v.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R. CO.

(*Dakota Supreme Court, February* 15, 1888.)

Killing Stock—Statutory Presumption—Directing Verdict.—Although the plaintiff in an action to recover for the killing of stock may have established a *prima facie* case within the meaning of the Dakota statute, by showing the killing of the stock by the defendant, it is the duty of the court to direct a verdict for the defendant, if the defendant's testimony shows, beyond a doubt, that the killing took place without fault on the part of its employees.

Same—Statutory Appraisement—Cumulative Remedy.—The provision of the Dakota Code which provides for an appraisement or valuation of stock killed or injured by a railroad corporation in the territory, is merely cumulative and permissive in its character, and a compliance therewith is not a prerequisite to the institution of a suit to recover damages for such killing.

APPEAL from District Court, Minnehaha County.

Action by Caroline Volkman against the Chicago, St. Paul, Minneapolis & Omaha R. Co. to recover damages for the negligent killing of a mare by one of defendant's trains. The defendant appeals from a judgment for the plaintiff. The opinion states the case.

H. H. Keith for appellant.

Bailey & Davis for respondent.

THOMAS, J.—Plaintiff brought this suit in the district court of Minnehaha county to recover the value of a mare, which she alleges in her complaint was run over and killed by defendant's engine and cars, through the gross negligence of its servants and employees, who were in charge and control of said train of cars at the time of the accident. The defendant, by its answer, puts in a general denial to the allegations of the complaint, and further alleges that its servants and agents were careful, prudent, and skilful in the management and running of said engine and train of cars on the occasion mentioned in the complaint. The plaintiff proved the ownership and killing of the mare, and it was stipulated by both parties that the reasonable value of said mare was $140. The defendant, among other witnesses, introduced the engineer and fireman, who were in charge of the engine at the time of the killing of said mare, all of whose testimony was in effect that there was no negligence or want of ordinary care or skill in the management of said

Facts.

engine and cars, on the occasion referred to, but their evidence showed clearly that the killing was unavoidable. The plaintiff then called one or two witnesses in rebuttal, but their testimony was immaterial, as it had no tendency to refute or contradict the evidence given by witnesses for defendant. Both parties having rested, counsel for defendant moved the court to direct a verdict in its favor, because there was no evidence in the case tending to show negligence or want of ordinary care on the part of its agents or employees in the management of its engine and cars at the time of the killing of said mare. This was promptly overruled by the court, and thereupon, after the usual charge by the court, the case was submitted to the jury, who returned a verdict for the plaintiff for the sum of $140, and judgment was entered in accordance therewith. In due time defendant, by its counsel, filed grounds, and applied to the court to set aside said judgment, and grant a new trial, which was denied, and defendant prosecutes this appeal, seeking a reversal of the judgment, and in this behalf assigns numerous errors, among them "the refusal of the court to direct a verdict for defendant." This is the only error perhaps that we shall notice at length, as we think it strikes directly at the *raison d'etre* of the judgment.

The plaintiff, by proving the killing of the mare, established a *prima facie* case under section 679 of the Code of Civil Procedure; and had defendant failed to introduce any proof, she would have been entitled to a verdict in her favor, under the direction of the court. But the defendant introduced its employees engaged in the running of the train at the time; and as their evidence shows no negligence, or want of ordinary care and skill, the *prima facie* case of plaintiff was overcome; and upon her failure to show affirmatively that defendant was guilty of gross negligence in the killing of said mare, she could not recover therefor. It is clear that but for the statute (section 679 of the Code of Civil Procedure) the mere proof of the killing would not be sufficient to make a *prima facie* case. As this section is in derogation of the rule at common law and the general rule of practice prescribed by our Code of Civil Procedure, it behooves us to consider the effect, scope, and object of this provision, in order to properly construe it. It seems to us that this section was enacted for the purpose of overcoming the difficulty, generally supposed to exist, with plaintiffs in this kind of actions, in making proof of facts which are only known as a rule to the servants and agents of the defendant. Hence, when the railway company placed their servants and employees, in whose breasts these facts are presumed to rest, on the witness stand, and purge their consciences by testifying, under oath, touching all the facts and circumstances within their knowledge, concerning the killing or

Statutory presumption—Duty of court to direct verdict.

injury, the reason for the statute ceases. To hold otherwise would work great injustice and oppression, and would be to prescribe a different rule for the adjudication of rights of persons and property engaged in the railway business from that which obtains in reference to other persons, whose rights of property are in no wise more sacred. This view of the law seems to be in harmony with the decisions of the courts of last resort of all the States which have a similar statute on this subject. Railroad Co. *v.* Wainscott, 3 Bush, 149; Railroad Co. *v.* Packwood, 7 Am. & Eng. R. R. Cas. 584; Railroad Co. *v.* Talbot, 78 Ky. 621; s. c., 7 Am. & Eng. R. R. Cas. 585; Durham *v.* Railroad Co., 82 N. C. 352. The position taken by counsel for plaintiff, that the question as to when the *prima facie* case is overcome is a question for the jury, is entirely untenable. It is clearly a question of law for the court.

Appraisement —Accumulative remedy.

The question raised by the counsel for defendant as to the necessity of alleging a compliance with section 680 of the Code of Civil Procedure, which provides for an appraisement or valuation of all stock killed or injured by railroad corporations in this territory, which question was raised by an action in the nature of a demurrer *ore tenus* in the court below, was properly overruled by said court. We regard the statute in question as merely cumulative and permissive in its character, and a compliance therewith is not a prerequisite to the institution of suits of this kind.

We are clearly of the opinion that the district court committed an error in refusing to grant counsel's motion to direct a verdict in favor of defendant; hence the judgment is reversed.

All the justices concurring.

Presumption of Negligence in Actons for Killing Stock.—Usually proof of the fact that the train struck and killed the animal is not evidence of negligence, but it is provided by statute in some States that proof of the injury will constitute a *prima facie* presumption of the company's negligence. See, generally, as to statutory provisions in regard to presumptions of negligence, Western, etc., R. Co. *v.* Steadely, 6 Am. & Eng. R. R. Cas. 584; Western Maryland R. Co. *v.* Carter, 11 Ib. 482; Little Rock, etc. R. Co. *v.* Kinley, 11 Ib. 459; Little Rock, etc., R. Co. *v.* Henson, 19 Ib. 440; Little Rock, etc., R. Co. *v.* Jones, 11 Ib. 443; St. Louis, etc., R. Co. *v.* Hagan, 19 Ib. 446; Brentner *v.* Chicago. etc., R. Co., 19 Ib. 448; Jones *v.* Columbia, etc., R. Co., 19 Ib. 459; Roberts *v.* Richmond, etc., R. Co., 20 Ib. 473; Savannah, etc., R. Co. *v.* Geiger, 29 Ib. 274; Kentucky Cent. R. Co. *v.* Talbot, 7 Ib. 585; Wilson *v.* North Carolina R. Co., 19 Ib. 453; East Tennessee, etc., R. Co. *v.* Bayliss, 19 Ib. 480; Hannibal, etc., R. Co. *v.* Young, 19 Ib. 512; State *v.* Devine, 31 Ib. 574.

CANADA SOUTHERN R. CO.

v.

PHELPS.

(14 *Supreme Court of Canada Reports*, 132.)

Fire—Communication from Premises of Company—Negligence—Questions for Jury.—In an action brought by P. against the appellant's company for negligence on the part of the company in causing the destruction of P.'s house and outbuildings by fire from one of their locomotives, it was proved that the freight shed of the company was first ignited by sparks from one of the company's engines passing the Chippewa station, and the fire extended to P.'s premises. The following questions *inter alia*, were submitted to the jury, and the following answers given:—*Q.* Was the fire occasioned by sparks from the locomotive? *A.* Yes. *Q.* If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? *A.* Yes. *Q.* If so, state in what respect you think greater care ought to have been exercised? *A.* As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty. *Q.* Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being the best kind, or because it was out of order? *A.* Out of order. P. obtained a verdict for $800. *Held*, That the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding.

Same—Damages Caused by Fire Spreading.—If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by a fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.

The statute 14 Geo. III, ch. 78 sec. 86, which is an extension of 6 Anne, ch. 31, secs. 6 and 7, is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act 31 Geo. III. ch. 31, but has no application to protect a party from legal liability as a consequence of negligence.

APPEAL, by consent of parties, under the 27th section of the Supreme and Exchequer Court Act, brought directly to the Supreme Court from a judgment of the Queen's Bench Division of the High Court of Justice for Ontario discharging an order *nisi* asking that a nonsuit should be entered or judgment for the defendants, or for a new trial upon grounds set forth in the order *nisi*.

The action was brought by the plaintiff in the Queen's Bench Division of the High Court of Justice for Ontario to recover damages for the loss of her buildings in the village of Chippewa, which were destroyed by fire on the 24th of July, 1881.

The plaintiff's statement of claim alleged that her buildings caught fire from a conflagration which was negligently allowed to spread from the defendant's buildings, namely, a freight house, owing to carelessness and negligence on the part of the defendants, and that these buildings of the defendants had been set fire to owing to the carelessness and negligence of the defendants, from a train passing over the railway of the defendants.

The fire spread and consumed a number of buildings in the village of Chippewa for the loss of which a number of actions were brought, in which it was agreed that the liability of the defendants should be determined by the result of this action.

The cause was tried before Mr. Justice Patterson, and he put the following questions to the jury, which were answered as appears below:

Q. Was the fire occasioned by sparks from the locomotive? *A.* Yes.

Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? *A.* Yes.

Q. If so, state in what respect you think greater care ought to have been exercised? *A.* As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty.

Q. Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defeetive, was it by reason of its not being of the best kind, or because it was out of order? *A.* Out of order.

Q. Was there anything in the working of the engine which, under the circumstances, was improper, and what was it? *A.* In our opinion should not have put on such a heavy pressure of steam, passing the freight house and other buildings, owing to the dry weather at that time.

Q. Was the state of the freight house such as, under the circumstances, and with reasonable regard to safety from passing trains, ought to have been permitted? *A.* No.

Verdict for plaintiff, $800.00.

The order *nisi* asking that a nonsuit should be entered, or judgment for the defendants or for a new trial was on the following grounds:—

1. That there was no evidence given by the plaintiff, of legal evidence of negligence by the defendants upon any of the

grounds of negligence relied upon by the plaintiff in support of the alleged liability of the defendants in this action.

2. That any damages shown, were too remote and not caused by any such negligence of the defendants, as they are in law liable for.

3. That by virtue of the Act 14, George III., ch. 78, § 86, the defendants are exempted from any liability to this action or

4. For a new trial upon the ground that the finding of the jury on the several questions submitted to them by the learned judge, is contrary to law and evidence, and for the misdirection of the learned judge in holding that there was legal evidence to support the same, and also to the weight of evidence at the said trial.

The evidence as to the carelessness and negligence of the defendants while running a special train passing their freight shed at Chippewa station, is reviewed in the judgment of Sir W. J. Ritchie, C.J., hereinafter given.

H. Cameron, Q.C., and *Kingsmill* for appellants.

Bethune, Q.C., for respondent, contended.

Sir W. J. RITCHIE, C.J.—The following questions *inter alia* were put to the jury:

Was the fire occasioned by sparks from defendant's locomotive? To which the jury answered, Yes. Then if so was it caused by any want of care on the part of the company or its servants, which under the circumstances ought to have been exercised? The jury answer Yes. And being asked to state in what respect greater care ought to have been exercised, the jury say that as it was a special train on Sunday when employees were not on duty there should have been an extra hand on duty. **Questions put to jury.**

Then some crucial questions:—Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind or because it was out of order? To which the jury answer, Out of order.

If there was evidence to support the first and last findings, viz: That the fire was caused by the defendant's locomotive and that the apparatus of the smoke-stack for arresting sparks was out of order, the case against the defendants would be established.

I think the irresistible inference from the evidence clearly establishes that the fire in the shed was caused by sparks from the defendant's locomotive. There was nothing whatever to shake the evidence of the boys, present on the passing of the train; on the contrary all the **Cause of the fire in the shed.**

surrounding circumstances confirm what they said, and the jury evidently believed their testimony, and no reasonable hypothesis has been suggested that the fire in the shed could have been ignited in any other way.

If, then, the testimony of the boys is to be accepted as true, there was evidence from which negligence might be inferred proper to submit to the jury.

There was no motion for a nonsuit, which indicates that defendants assumed there was such evidence in plaintiff's case, but whatever question there may be as to that, the evidence drawn from the defendants' witnesses supplied any deficiency there may have been in the plaintiff's case.

Evidence drawn from defendants' witnesses.

Mr. Domville—recalled, says:

Q. This is established as the actual screen on the locomotive on the day in question; will you look at it and say what that screen represents in reference to your knowledge of the screens of locomotives used on the Great Western Road? *A.* Well, it is a fair ordinary screen; I would not consider it a first-class one. I would think a screen with several holes in it like that, I would have darned it. I have seen better screens and I have seen a great deal worse. Of course it might have got worn after removing it; the cross wire.

Q. In regard to the general character of the screen, how would it compare in its mesh and general arrangement with the screens used by the Great Western? *A.* It would compare favorably with the screens we have been in the habit of using.

Q. Are there any other screens which would be different from this screen in coal burning locomotives? *A.* No. The wood-burning screen is smaller. I would not have been afraid to run that screen on a train for a short time longer, even in its present state. I would not have condemned the screen for the state it is in now. Without darning, I mean, I would have run that another week rather than stop an engine, and then I would have taken the first opportunity of repairing it.

Q. Assuming that this screen was removed it was still worth repairing? *A.* Yes. There is quite enough substance in it which when repaired would answer it still. This would last at least another month, or perhaps five or six weeks.

Q. In connection with your duties, is there any particular reason why the actual condition of a screen like this should be examined into from time to time? *A.* We cannot afford to throw away screens, and we exercise due caution in having them darned from time to time. It is greater economy to repair them from time to time than to let them get in such a state that they are beyond repair. You might get a big hole in one side.

Q. A stitch in time save nine? *A.* Yes, that would be the case with this.

Q. They are expensive? *A.* Yes, that would cost about four dollars to put on an engine. It makes a considerable difference in the expense of running trains.

Q. And what is the ordinary duration of a screen like this? *A.* From two and a half to three months; and it depends on the material, whether it is really good or not, and as to whether the manufacturer has given you *bona fide* steel, or put some iron in. What we look for is steel. We pay steel price for it.

Cross-examined: *Q.* I suppose in very dry weather, when everything is ready to go off like tinder, you would probably be more careful about the meshes of the smoke-stacks than in winter? *A.* We always are, and for that reason our practice is to tell the foreman to be careful in examining them. Especially in dry weather.

Q. I see some holes down there; that would emit a pretty large spark? *A.* Yes. A spark getting through that might set fire to a building in a very short time. Our cones for coal burning engines are as near as possible like that one on plan 4. Ours might possibly have a little more lip. The more lip you have to a cone the less likelihood there is of a spark being driven against the wire. If the whole force came against the wire, it would soon wear the netting through.

Q. Supposing the cone became displaced so that there was more action on this wire, it would be very much more likely to get through? *A.* Yes.

Q. Suppose you found a shower of sparks coming in such a manner that a bare-footed boy had to dance about to get away from them, would not that indicate there was an imperfect mesh? *A.* If the man had been firing with very small coal, and put it on in a hurry, he might get a shower of sparks like that.

Q. That shower would be dangerous if it fell on combustible material? *A.* No doubt. There would be a chance of a blow up if such sparks fell where there had been coal oil.

Q. Of course a driver in going past a freight house in a village ought to be more careful than in the open country? *A.* Well, I think a man might use a little caution in passing through stations and places like that.

Q. It would be a very hazardous thing to fire up with small coal in passing by such a place as this in question? *A.* I do not think a man should do it.

Q. Can you conceive a shower of sparks coming through a perfect mesh from any other cause than by firing in that way—throwing in small coal? *A.* Oh, a man might do it by throwing his engine over, and putting on steam in a hurry, and so lift the coal; it is quite possible he might do that. Or if an engine

starting away with a train should slip a good deal it might throw such sparks.

Q. To do that would be dangerous in the proximity of a station? *A.* Well, that cannot be avoided sometimes in starting. He might do that while he was running, but I do not think any man would go to do that. If he did do that it would be very dangerous.

Q. So that the sparks could come from the defective netting and also from the defective netting and bad management, as well from one as from the other? *A.* Yes.

Q. Do you think you would undertake to run that covering the way it is now in a dry time? *A.* Yes, I think I would.

Q. You do not think you would be in great danger of burning the country up? *A.* There would be more danger than with a perfect netting, of course.

Charles K. Domville, sworn:

Q. What is your profession? *A.* Locomotive engineer.

Q. In what position are you now? *A.* I am a locomotive superintendent of the Great Western Division of the Grand Trunk R., and I have been for the last six and a half years locomotive superintendent of the Great Western R.

Q. Have you had experience prior to that, practical experience upon railways? *A.* Yes, I have had charge of the locomotive department of railways since 1851.

Q. Are you acquainted with the mode of construction of loco motive engines used upon Canadian railways? *A.* I am.

(Plan produced, which was afterwards marked as Exhibit 4.)

Q. Perhaps you can give me some of the chief particulars; I have got here what is supposed to be a sort of section of the smoke-stack on the locomotive; what are the chief requisites of a smoke-stack in connection especially with the ordinary and usual means which are used to prevent the emission of sparks through the firing up of locomotives? *A.* The principal things are as shown upon the drawing, the netting across the top and the cone in the centre. This netting is made of fine wire mesh; it is made of different sizes. There is very little difference in them, some people use larger wire than others, and the opening in some is less than others. That inverted cone is for the purpose of the sparks striking against it and returning them into the smoke-box, and it destroys them to such an extent that when sparks are emitted out, the fire is out of them, and they are very little when they do come out. The first result of the firing up is to drive the chief stream under that cone. That cone is so constructed that it carries the whole body with it at first; the whole of the sparks strike that at once. They strike the covering of the cone; there are an immense number of sparks get stuck in the netting and are returned into the smoke-

box. The chief volume of sparks are arrested in their escape by the cone and then thrown back and fall into the smoke-box.

Q. And reach that in a much smaller condition than they were? *A.* Yes, very much smaller, the cone breaks the force of the volume which is emitted.

Q. And also breaks the different sparks into smaller portions? *A.* Yes, it has that effect. And then they are thrown back into the smoke-box, a great many of them rest there.

Q. What proportion rests there and are not carried off with the smoke? *A.* Sometimes there is a very large proportion there; it all depends upon the working of the engine. Those are cleaned out at the end of the journey below.

Q. Everything which is capable of passing through the screen goes off there in smoke, the small particles? A. Very small particles.

James H. Rushton, foreman of the boiler making at St. Thomas:

Q. What experience have you had in the making of these screens? *A.* About 12 years.

Q. Suppose you were perfectly satisfied that a shower of sparks, such as described by these little boys, you would think from that that there must be something wrong with the netting? *A.* If I saw them myself, I would.

Q. What would you think was wrong with the netting? *A.* I would think there was some holes in the netting. I should think there was not any netting there at all.

Q. Do you think the managing of the engine could have anything to do with that? *A.* It might.

Q. Do you think a man could get the fire so shaken up as to send out a shower of sparks like that, either by stirring up his fire or putting on steam? *A.* Oh, it might throw out a little more.

Q. That would be very dangerous in passing a station where everything was dry? *A.* Yes.

Q. And you think it would be dangerous to run with a netting that would throw out a shower of sparks as described by these boys? A. I should think so.

Q. You could have a netting to prevent sparks coming out such as described by these boys? *A.* Yes, if there was any netting at all I do not think sparks such as described by them could come out. If the holes were twice as big as they are now they would not even then get out in such a shower as the boys have described.

Wm. A. Short, master mechanic of the C. Southern R.

Q. Suppose you found a shower of sparks coming out on the platform, burning boys' feet and going down their backs, and

leaving black marks on the platform, would you think that extraordinary, or is that a usual thing? *A.* I have seen it. Some platforms have small charred marks on them. It might have been from defective netting in some other place.

Q. If the netting was perfect you would not expect to find these indications on the platform? *A.* No. I was here when the boys gave their testimony.

Q. If what they said was true, it would indicate that there was something wrong in the netting? *A.* I did not hardly take so much stock in what the boys said this morning.

Q. Just assume that what the boys said was true; would you not infer from that that there was something faulty in the netting? *A.* I cannot say; I have answered you correctly every thing you have asked me.

Q. If you were on another railway what would you think if you saw what these boys did? *A.* When an engine is passing I never saw any red-hot sparks yet.

Q. Assume that you found the same quantity described by these boys as coming out of the pipe and dropping down, would you not infer from that that there was something faulty in the netting? *A.* I do not know; it is hardly a fair question I think

Q. Could what the boys said be true if the netting was perfect? *A.* No, sir, it could not be true.

Q. Of course it follows that if the boys' stories were true the netting could not be perfect? *A.* If the netting was perfect you could not get such a shower as that.

David Wright, locomotive foreman at Victoria:

Q. If you found a shower of sparks as described by these witnesses this morning would you not think there was something wrong with the netting? *A.* Most decidedly.

Q. Suppose the cone got a little put to one side? *A.* It would have a tendency to throw cinders on the opposite side. It would give more space on one side for sparks to go through.

Patterson Hall, engineer in charge of the locomotive:

Q. Is it part of your duty to examine the netting? *A.* Yes. I would not swear to a day or two when I examined it.

Q. Do you remember whether the coal was ever thrown back so as to burn you while you were on the tender? *A.* I never felt anything of that sort.

Q. That would not be possible? *A.* Well, I suppose it would be.

Q. Do you think, with a good netting like this, that the fire would ever get through? *A.* I do not know. I never have been burned that way.

Q. If a shower of sparks came as to burn the boys' feet, what would you think? *A.* I would think there was fire.

Q. Would you think the netting was all right? *A.* Yes; well, I do not know.

Q. If fire enough came to burn their feet in that way, would you think the netting was all right? *A.* No, I would not.

Q. You would think it was all wrong? *A.* Yes.

The mass of sparks of the character of those described by the witnesses was, as proved by defendant's skilled witnesses, evidence that defendants had not adopted every precaution that science or practical experience would suggest to prevent injury, in other words, the screen was both insufficient, defective, or not in proper working order or properly placed on the stack; that had the screen been in proper working order, no such quantity of sparks could have been emitted. The evidence of Short, master mechanic of the Canada Southern R., Domville, a locomotive engineer, Rushton, foreman of the boiler works, Wright, locomotive foreman, and Patterson Hall, the engineer in charge on the occasion, all concur in the opinion that if there was such a shower of sparks as described by the boys, the netting could not have been perfect and there must have been something wrong with it.

Shower of sparks shows negligence.

If the fire in the freight shed was caused by the negligence of the defendants, they would be clearly liable for damage occasioned by the fire extending to plaintiff's building.

The appeal must therefore be dismissed with costs.

STRONG, J.—The evidence of negligence was amply sufficient to warrant the judge who presided at the trial in leaving the case to the jury. The large shower of sparks which are proved to have been emitted from the smoke stack of the engine and the evidence as to the condition of the iron netting made the case a proper one for the consideration of the jury. It was argued, however, that the statute 14 Geo. III ch. 78, sec. 86, applied and exonerated the appellants from all liability, inasmuch as the fire was accidental and began on the appellants' own property. That enactment is as follows:—

Evidence of negligence.

Application of statute of George III.

"No action, suit or process shall be had, maintained or presented against any person in whose house, chamber, stable, barn or other building, or on whose estate, any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding."

This provision which is an extension of 6 Anne, c. 31, sections 6 and 7, is, I have no doubt, in force in the Province of Ontario as part of the law of England, introduced by the constitutional act, 31 G. III, ch. 31, but I am clear that it has no application

whatever to protect a party from legal liability as a consequence of negligence. At common law a person who brings or originates on his land any dangerous element, such as fire or an accumulation of water, or any other thing which if it should escape may damage his neighbor, does so at his peril, negligence being in such cases entirely immaterial. This is shown by the case of Fletcher *v.* Rylands, L. R. 3 Q. B. 733, where persons who formed on their own land a large reservoir of water were held liable on this express ground for damage done to their neighbor by the escape of the water, though no negligence was proved; and Jones *v.* Festiniog R. Co., L. R. 3 H. L. 330, proceeded upon the same principle, it being held that a company who had power to maintain and run a railway to be worked with horse power, no authority being given by statute to run steam engines, were liable at their peril and irrespective of negligence for damage caused by a locomotive which they had made use of. Subsequently in the case of Nichols *v.* Marsland, 2 Ex. D. 1, the same principle was recognized, though an exception to it was also admitted in that case upon the facts there established of the escape of the water having been caused by *vis major*. The rule of the common law there held applicable to water would, but for the statute before referred to, be equally applicable to fire, and every person who might light a fire in his house for ordinary domestic purposes would but for that enactment be bound at his peril to keep it safely, and liable to his neighbor for any damage which it might cause him though no negligence could be imputed. It was only to mitigate this rule of law that the statute was passed, and it was not intended thereby to alter the law of liability for negligence. Two cases both of high authority establish this very distinctly, Filliter *v.* Phippard, 11 Q. B. 347; and Lord Canterbury *v.* Attorney General, 1 Phi. 328. In the first of these cases the plaintiff on proving negligence was held entitled to recover damages against the defendant on whose land the fire accidentally began; and in the second Lord Lyndhurst rejected the argument that the suppliant in a petition of right was disentitled to recover, because the damage caused to him by a fire beginning on the property of the Crown was shown to have been caused by accident, it being also shown that the fire arose from the negligence of the servants of the crown. In the fifth edition of Addison on Torts, the learned editor, Mr. Justice Cave, recognizes these cases as having settled the law as to the effect of the statute, and I have found no authority and heard no argument which leads me to doubt for a moment that this is a sound conclusion.

Same—Authorities.

In some of the United States, the qualification in the case of

fire of the principle of liability before stated, which has been introduced by the statute in England seems to have been considered by the courts as applying at common law. The decisions which have adopted this common law relaxation of the general doctrine seem to rest it on the necessity which every one is under to keep and use fire, thus rendering it unreasonable as regards that element to enforce the strict duties which apply to other noxious things; and this view, by which the case of fire is treated as exceptional at common law, and irrespective of the statute, has also prevailed in the Province of Ontario as is established by the cases of Dean *v.* McCarty, 2 U. C. Q. B. 448, and Gilson *v.* North Gray R. Co., 35 U. C. Q. B. 475.

It is sufficient, however, here to say, without pursuing the subject further, that neither the statute of George the III., nor the decisions introducing the restriction to the common law rule, in any way relieve persons from liability for their own negligence or from responsibility for the negligence of their servants.

It was further argued that the damage proved by the plaintiff was too remote, inasmuch as the fire was not communicated directly to the plaintiff's house but spread from the defendants' property to the houses of third persons from whence it reached the plaintiff's house. There are certainly American authorities sustaining the appellants' contention on this head, but no English case has been cited which would warrant such a proposition and the American cases are far from uniform. The courts which deny the liability in such a case seem to have been influenced by a regard to the serious consequences and enormous liability which a responsibility in damages under such circumstances might involve rather than on any sound principle of law. It seems to me that the well known case of Scott *v.* Shepherd, 2 W. Black, p. 892; 1 Smith L. C., p. 466, though the facts are not the same, is in principle directly in point and fully establishes the liability. The subject is discussed in the work of a very able contemporaneous American writer, Mr. Justice Cooley, in his treatise on Torts, P. 77, and although we may not be permitted to cite his work as authority, yet I think a careful consideration of his reasoning will convince any one that the facts in question can have no influence on the question of liability and that the American cases which determine the opposite have no foundation in legal principle.

Remoteness of damage.

The case was fairly left to the jury, and the appellants have nothing to complain of either on the ground of the verdict being against the weight of evidence or as regards the amount of damages.

The appeal should be dismissed with costs.

Fournier, J., concurred that the appeal should be dismissed with costs.

HENRY, J.—In dealing with the circumstances of this case, I may premise that the statute 14 Geo. III, ch. 78, sec. 78 has, in my opinion, no bearing upon the present case; and I consider it therefore unprofitable and unnecessary to discuss the several, contradictory decisions given, and views expounded, in respect to it in England. I do not consider that it has any application to cases where damage has been done by fire produced by railway engines when passing through the country. The principles of law applicable to such cases have been so well ascertained and settled by the numerous decisions to be found in the reports in England, in the United States and in this country, that it is unnecessary to debate what has been so fully determined, and that in such a way, as to the leading principles, that they can hardly be misunderstood.

Statute of Geo. III. no application.

The acknowledge principle is that a railway company chartered by the legislature has the right to use its locomotive engines over its lines propelled by steam generated in the usual way; even although the use of the fire by which the motive power is produced is dangerous from its tendency to set fire to objects near to where the engines run; rapid combustion of the fuel is necessary to the production of the necessary motive power and that necessitates a strong draught in the smoke-stack or chimney. That strong draught carries with it partly consumed fuel, in a burning state, calculated to set fire to objects upon which it falls. To prevent such results means were found necessary, and have been adopted and applied for preventing, as far as possible, the sparks of burning fuel from being carried by the draught outside the smoke-stack; and the principle established as applicable to the owners of railways and their liability in cases of damage by fire is, that if they were the ordinary and well known means for such prevention they are not answerable for any resulting damages. The points, then, necessary to be established in such cases are first, that the damage was caused by fire proceeding from the engine; and secondly, that the company was guilty of negligence either in not using the proper preventive appliances or in some other way in the management or working of the engine by which the damage was caused; and in some cases the question of contributory negligence on the part of the plaintiff.

Use of steam—No liability except for negligence.

The jury have found in this case, I will not say improperly, that the fire to the station house of the appellants was caused by sparks from the engine, nor, as it was I think a question

of contradictory evidence, can their finding as to the question of negligence arising from the alleged defective state of the hood in the smoke-stack be set aside; but whether the appellants are an swerable under the circumstances in this case is a question in my mind of no small difficulty. The fire did not spread to the house of the respondent, and it must have been ignited by sparks or burning wood having been carried by the wind across a part of the railway station and a street, a distance of over 100 feet. Railway companies have been held answerable for the ordinary consequences of the spread of the fire from their station houses or grounds, but can it be held that they would be answerable for damages resulting from the course that the wind held at the time the damage was caused? If answerable when the sparks should be carried 100 feet they would be equally answerable if they were carried half a mile, or any other greater or less distance, and set fire to and damaged property. If the principle is sound in its application to the one case, it is equally applicable to another, and where should the line be drawn? Railway companies may fairly be held to be bound to know the state of the immediate surrounding territory, and if a quantity of inflammable and combustible matter is on or contiguous to the line of railway, forming the means for ignition and spreading, they may be held bound to know it, and the natural consequences of a fire set to that matter, and to guard against it by the ordinary precautionary means; but I don't think they can be held answerable for an injury that is not the natural or consequential result. Suppose the case of an engine passing through a city, town, or village, and sparks, negligently permitted to escape from the smoke-stack, passing over several squares and buildings set fire to and burn a house beyond, would the owners of the engine be answerable for the damages resulting solely from the direction of the wind and other independent causes at the time? And if through and by means of frequent changes of wind, whole squares were burnt by the spreading of the fire from the house first set fire to, would the owners of the engine be answerable to the owners of all the houses situated on those squares? If answerable for the first house burnt, what would limit the liability to that one? A difficulty has arisen and has not yet been satisfactorily resolved as to the limit of responsibility where a fire spreads by the ignition of combustible matter along its track, but if the liability of the owners of the engine in the present case is adjudged, the difficulty will be immeasurably increased; and railway companies may be held answerable for the burning of half a city, town, or village. In the case of buildings or other insurable property, it is unnecessary so to decide, as insurance is presumed to cover the bulk of such property, and the owners only

Liability for damage done by fire spreading.

taxed for the indemnity they obtain. It is, therefore, not so necessary by legal decision to seek other indemnities for them. I don't feel justified or willing to establish a principle having such important consequences and results. In the case of Ryan *v.* The New York Central R. Co., 35 N. Y. Rep. 210, the court of appeal of that State decided that, although negligence was proved, the company was not liable in a case wherein the fire commenced in burning some wood in one of the company's sheds, which was also destroyed, and from there by the force of a strong wind the fire was carried to, and consumed, the plaintiff's property, which was distant about 130 feet from the shed. The court holding that the plaintiff had no cause of action against the company, on the ground that the damage to the plaintiff was not the necessary or natural consequence, ordinarily to be anticipated from the negligence committed. That the plaintiff's injury was the remote and not proximate result of the fire in the shed, and too remote to give a cause of action.

Same—New York cases examined.

In a subsequent case, however, Webb *v.* The Rome, Watertown & Ogdensburg R. Co., 49 N. Y. Rep. 420, the same court, composed partly of other judges, held that where coals were negligently dropped from the company's engine, which set fire to a tie, from which the fire spread to an accumulation of weeds, grass, and rubbish lying on the road and from those spread to a fence, and into plaintiff's woodland, and burnt and destroyed his trees, the plaintiff was entitled to recover.

It will be observed that the latter case is plainly distinguishable from the other and from this one. In that case, through the negligence of the company, the means for the spreading of the fire on their own property existed, by which the fire spread to their fence, and thence into the land of the plaintiff. The spreading of the fire from the tie was therefore from a cause for which the company was held answerable. In this case it is not shown that through the negligence of the appellants the means for the spreading of the fire from the station-house to that of the respondent existed. In fact the opposite is shown; for there was no combustible matter shown to have existed by which the fire could spread to the barn and house of the respondent—there was an open space of over one hundred feet, formed by an angle of what is marked on the plan in evidence "First Cross Street," and nothing by which the fire could spread, and, therefore, no negligence could be imputed as to the spreading of the fire. In the case of Ryan *v.* The New York Central R. Co., 35 N. Y. R. 210, before referred to, the decision of the court was pronounced in an able judgment pronounced by Hunt, J., on the question of proximate and remote damages, and illustrates his views by a supposed case which, with others, he puts. He says:

"So if an engineer upon a steamboat or locomotive, in passing the house of A, so carelessly manage its machinery that the coals and sparks from its fires fall upon and consume the house of A, the railway company or the steamboat proprietors are liable to pay the value of the property thus destroyed. Thus far the law is settled, and the principle is apparent. If, however, the fire communicates from the house of A to that of B, and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C, and thence to the house of D, and thence consecutively through the other houses, until it reaches and consumes the house of Z, is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such a case. Where, then, is the principle upon which A recovers, and Z fails? Again he says: Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that in one case, to wit, the destruction of the building upon which the sparks were thrown, by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building, that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case as supposed, the destruction of the building is not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed, or seriously injured, must be expected; but that a fire should spread, and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon a necessity of a further communication of the fire, but upon a concurrence of accidental circumstances. Such as the degree of heat the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained for the reason that the damages incurred are not the immediate, but the remote, result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote."

In the case of Pennsylvania R. Co. *v.* Kerr, 62 Penn. 353, in the supreme court of Pennsylvania the judgment of the court was delivered by Chief Justice Thomson. It was in an action to recover damages for the burning of goods in a tavern, leased by the plaintiff, and which was ignited and consumed, with its contents, by fire communicated

Same—Pennsylvania Co. v. Kerr examined.

from a building set on fire by sparks from the defendant's engine. He says:

"It has always been a matter of difficulty to determine judicially the precise point at which pecuniary accountability, for the consequences of wrongful or injurious acts is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury, which amounts to a limitation. It is embodied in the common law maxim, *causa proxima non remota spectatur*—the immediate, and not the remote cause, is to be considered."

He then refers to an illustration of the rule to be found in Parsons on Contracts, 3 vol. p. 198, and refers to notes in the same volume at p. 180. He again says:

"It is certain that in almost every considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensure and so ramify, as more or less, to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organized society. Every one in it takes the risk of these vicissitudes."

Again:

"It is an occurrence undoubtedly frequent, that, by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences, and there is a good reason for it. The second and third houses in the case supposed were not burned by the direct action of the match; and who knows how many agencies might have contributed to produce the result. . . . The question which gives force to the objection that the second or third result of the first cause is remote, is put by Parsons, vol. 2, 180, 'did the cause alleged produce its effects without another cause intervening, or was it made to operate only through, or by means of, this intervening cause?' There might possibly be cases in which the cause of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable."

He cites Lowrie, J., in Morrison *v.* Davis & Co., 8 Harris 171, in support of his views, who, in giving judgment in that case says:

"There are often very small faults, which are the occasion of the most serious and distressing consequences. Thus a momentary act of carelessness set fire to a little straw and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this little fault, one third of a city

(Pittsburg) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed?

Bigelow, in his list of overruled cases, p. 437, puts down the judgment in Ryan *v.* New York Central R. Co., 35 N. Y. 210, as "denied" in Kellogg *v.* Chicago & N. R. Co., 26 Wis. 223–238. I have examined the latter case and find that although impliedly perhaps but not expressly the principle of remoteness is denied; and as I read the judgment of the majority of the court—there having been a decision of two to one—it is hardly even impliedly denied. The circumstances in the two cases were somewhat different. In the case of Kellogg *v.* the Chicago Co. the fire was caused by sparks from the engine which fell on dry grass on the defendant's grounds alongside of the track, and by means of combustible matter was carried to and consumed the plaintiff's stacks of hay, sheds and stables. It was therefore one continuous burning and in that respect different from the circumstances in the other case, and Chief Justice Dixon, who gave the majority judgment, appears to have decided it upon the fact that the fire was uninterrupted throughout, and he so treats it. He says:

Same—Kellogg v. Chicago & N. R. Co.

"If when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to everything which the fire consumes in its direct course."

The distinction drawn by the dissenting judge (Paine) between the result of a fire spreading, as it did in that case, and that of the effect of burning sparks carried by the wind a distance from the building first ignited to another which is consumed is applicable to this case. He says:

"It seems to me that where it is negligently kindled, the destruction of whatever is in such a situation as to burn, by the mere force of the conflagration, without other intervening cause is the direct and proximate consequence of the negligence. . . . But, where such a fire is kindled, and by reason of some other intervening cause, it is carried or driven to objects which it would not otherwise have reached, the destruction of such objects would fairly seem to be a remote consequence of the negligence. . . . Thus if a person should negligently set fire to a building in which powder was stored, and the explosion of the powder should throw fragments of the burning building to other buildings that would not otherwise have been reached and set them on fire; or, if an unusual gale of wind should carry such fragments to a distance with the same result, the damage

for the loss of such other buildings might justly be said to be remote.

When, however, the year after the judgment in that case was given, an application for a rehearing was made, in the judgment thereon given, the law, as laid down in the Ryan and Kerr cases, was denied, and I will not go so far as to say, that the liability must necessarily in all cases be confined to the first object destroyed.

Destruction of second building by fire communicated by first.

There have been, and no doubt there will be, cases where the destruction of a second building by fire communicated from the first, may be found to be the natural and consequential result—where the two are connected by combustible materials, forming part of the one or the other, so that under almost any circumstances the destruction of one must result in the destruction of the other, there can be little doubt that for the destruction of the second through the burning of the first, the party guilty of the negligent burning of the first should be held answerable for the loss of the second, the burning of which was the direct and natural result of the burning of the first. Such, however, is not the present case. If the wind at the time had been from an opposite or even slightly different quarter, the respondent's house would not have been burnt. The burning of it was, therefore, not alone the usual or natural result. The burning of the respondent's house was not necessarily, and would not have been in ordinary circumstances, the cause of the damage. It may be admitted that if the appellants' building had not been set fire to, the damage to the respondent's would not have been occasioned; but it must be also admitted that, but for the particular direction and force of the wind at the time, the damage would not have been done. Is, then, a party who negligently causes the destruction of his own or his neighbor's house answerable for, not an immediate or ordinary result, but one arising from a cause over which he had no control? If a fire thus caused is in the near vicinity of houses in every direction around it, which would be in no danger unless with the presence of a strong wind, is the party answerable for any one or more of them that the wind happens to carry sparks to? His liability in such a case would not arise from the natural effect of the original cause, but from a *vis major*, which he would have no part in producing, and would he be answerable for the effect of the wind, at one time carrying the sparks to the house of A, and by a change of direction should subsequently carry other sparks from the first building on fire, in an opposite direction to the house of B? Could it be reasonably said that in both cases the damage was the natural and consequential result, and if not

in both how could it be said that it was so in either? And is it not the proper conclusion that both were attributable to the fortuitous direction and operation of the wind?

In Pennsylvania R. Co. *v.* Hope, 80 Penn. R. 373, Chief Justice Agnew delivered the unanimous judgment of the court. It was a case of negligently leaving combustible materials on the railway ground, which ignited; and from which the fire spread to, and consumed the plaintiff's property. He says the question of the proximity of the result of a fire by which the plaintiff's property is destroyed is solely for the jury aided by proper instruction from the presiding judge. He canvasses the judgment in the case of the Railroad Co. *v.* Kerr, and sustains the law laid down in it, but distinguishes the two cases. He says:

Pennsylvania R. Co. v. Hope.

"As the case was placed before the mind of Chief Justice Thomson, there is no reason to doubt the correctness of his conclusion."

Again:

"From the very issue of the thing, the natural probability of a consequence, which ought to have been seen, is a matter of fact to be determined upon the evidence. Every case must depend upon its own circumstances."

Referring to Railway Co. *v.* Kerr and Kellogg *v.* Chicago & N. W. R. Co., 26 Wis. 223, he says:

"That in the former point was: that the burnings were distinct and separate, a series of events succeeding one another, while in that before him, there was but one burning. One continuous conflagration from the time the fire was set on the railroad, till the plaintiff's property was destroyed."

He, therefore, unreservedly approves of both judgments—the one deciding, that in the case of the distinct and separate burnings, the damages were remote; but in the case of the one continuous burning they were proximate.

I have referred to all the English cases and decisions that I could find likely to throw light on the difficulty presented in this case, but I could not find any decision upon the application of the rule of law applicable to a case like the present. Cases are reported, where the damages were occasioned by the setting fire to combustible materials found to have been negligently left on the railway grounds, by sparks from an engine and, the spreading of the fire therefrom, by one continuous conflagration to the properties consumed of the parties claiming damages; but there is no case that I can find where the distinction was drawn, between such cases and one in which damage was occasioned by sparks carried a distance by the wind, and doing damage. As far as I can discover, no case has been determined in England in which it

No English decisions in point—Weight of American authority.

has been decided that damage done, as in this case, was proximate or remote. Whether such damages are the natural, and ordinarily, to be expected, result is a question I believe not yet deliberately decided in England; and, as each case should be decided by its own circumstances, it becomes a question for a jury to resolve in each case. There are no doubt cases where a party may be answerable for such damages but they are not the usual ones. Several cases have been tried in the United States, where it was shown that one continuous fire, spreading from sparks from engines, by means of combustible matter on, and alongside of, the railways, consumed property, wherein the railway companies were held answerable. As to cases like the present, the decisions are not uniform and some of them were decided on the liability imposed by statutes, but, as far as I am capable of judging, the weight of authority favors the classing of the damages in such cases as remote.

Propriety of giving case to jury.

It is necessary, however, according to the course adopted generally in England and in the courts in the United States, to submit to a jury, the question whether, under the circumstances in evidence, the burning complained of was the natural and ordinary result of the imputed negligence. My own opinion is, that, under the circumstances in this case, there was not a sufficient liability established by the evidence, to justify such a submission; and, still less, for the presiding judge, to withdraw the matter from the jury, as was done, as it appears to me, in this case.

In Pennsylvania R. Co. *v.* Hope, 80 Penn. 373, in 1876 it was expressly held by the supreme court of that State that such an issue was for the jury. The head note is as follows:

"Sparks from defendant's engine fired a railroad tie, from which rubbish, left by the defendants on their road, was fired, communicated with plaintiff's fence next to the road, and spread over two fields, burned another fence, and standing timber 600 feet distant from the road. *Held*, that the proximity of the cause was for the jury.

"2d. In such case, the jury must determine whether the facts constitute a continuous succession of events, so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants."

"3d. The rule for determining what a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that it might and ought to have been foreseen under the circumstances."

"4th. Pennsylvania R. Co. *v.* Kerr 12 P. F. Smith, 353, distinguished."

The learned judge who presided at the trial put the following

questions to the jury, which were answered as follows: *Ubi supra*, p. 208

It will thus be seen that the questions and answers just quoted have reference only to the origin of the fire in the freight-house of the appellants; and not, in the least degree, referring to the catching on fire of the respondent's barn or house. The charge of the learned judge is not reported, and we are unable to judge how he charged in reference to the latter question, if he did so at all. I should judge from the nature of the questions and answers, that the question as to the natural and ordinary result was not in any way submitted. It is in my opinion a clear case of non-direction upon the vital issue, to properly determine the case. Had it been a general verdict, without questions and answers we might possibly assume—but that would perhaps we going too far—that all the necessary issues under the pleadings had been submitted to, and found by the jury; but such was not the course adopted. The findings of the jury on the questions put to them are alone insufficient upon which to found a judgment. They only refer to the setting fire to, and destruction of, the appellants' property, but in no way refer to that of the respondent.

In my opinion the appellants, as a question of law, are not answerable to the respondent for the damage she complains of, but if I am wrong in that position, the liability should be ascertained by a jury, on issues properly submitted.

I think the verdict should be set aside, and a judgment of nonsuit entered, or, under any circumstances, a new trial granted—with costs.

GWYNNE, J.—I concur in the opinion that this appeal must be dismissed, but it is unnecessary, in my opinion, to decide in this case whether it is an established legal proposition that a fire originating in negligence can never be a fire "beginning accidentally" within the meaning of 14 Geo. III. c. 78 sec. 86; it is worthy of remark, however, that the observations of Lord Denman in support of this proposition, criticising the opinion to the contrary of Sir William Blackstone as expressed in his commentaries, and the observations of Lord Lyndhurst in Lord Canterbury's case, 1 Ph. 306, were unnecessary to the decision in Filliter *v.* Phippard, 11 Q. B. 347, and are therefore open to the same objection as, n the opinion of Lord Denman, were the observations of Lord Lyndhurst in Lord Canterbury's case. The judgment of Filliter *v.* Phippard is, by Lord Denman himself, rested upon the ground that a fire which was knowingly and intentionally lighted by the defendant could never be said to be a fire beginning accidentally within the meaning of the statute. Neither that case,

Application of statute of Geo. III.

therefore, nor that of Vaughan *v.* Menlove, 3 Bing. N. C. 468, therein referred to, can, I think, as I have endeavored to point out in Jeffrey *v.* Toronto, Grey & Bruce R. Co., 24 U. C. C. P. 276, be said to establish such a proposition; against it must be taken the opinion of Sir William Blackstone, and the express decision of the learned judge Sir John B. Robinson, C. J., in Gaston *v.* Wald, 9 U. C. Q. B. 586, and the fact mentioned by Lord Lyndhurst in Lord Canterbury's case, that although cases of damage from the burning of houses by negligence have frequently occurred since the statute, no instance had ever occurred to his knowledge, nor can be found in the books, of an action having been brought to recover compensation for this species of injury, nor is there any trace of any such proceeding.

The fact that no trace can be found in the English courts of such an action having ever been brought, is to my mind strong evidence that the proposition that a fire originating in negligence can never be a fire beginning accidentally within the meaning of the statute, is at variance with the general impression of the English mind professional and lay, and in the absence of any such action, the rule of Lyttleton referred to in the Attorney General *v.* Vernon, 1 Vernon, 385, may well apply, namely—"what never was never ought to be." When the point does directly arise, it will be time enough to consider the foundation upon which the proposition can be, if it can be, supported, and to decide between the opinion of Sir Wm. Blackstone with the dictum of Lord Lyndhurst, though it was unnecessary to the decision of the case before him, supported by the considered judgment of Sir John B. Robinson, C.J., on the one side, and the dictum of Lord Denman, which was also unnecessary to the decision of Filliter *v.* Phippard, on the other.

The statute of Geo. 3 referred to has however no application whatever, in my opinion, in actions like the present against railway companies for compensation for injury, alleged to have been occasioned to the plaintiff by negligence upon the part of the defendants and their servants, in the use by them of the dangerous element which they are by law authorized to use, but this non-application of the statute is not because a fire originating in negligence cannot be an accidental one within the meaning of the statute. The principle upon which the liability of railway companies in such cases rests, is, in my opinion, this:

Principles on which liability of railway depends.

By the common law, apart from any statute, where a person for his own private purposes brings upon his premises an engine of an extremely dangerous and unruly character, such as a locomotive engine worked by the dangerous element of fire, which, if it should escape from the fire-box, in which for the working of the engine it is contained, is calculated to do much mischief, he

must keep that fire confined, so as to prevent its doing mischief at his peril; and if he does not do so he will be responsible for all damage which is the natural consequence of, and directly resulting from, its escape, unless he can excuse himself by showing either that the escape was owing to the plaintiff's fault, or was the consequence of a *vis major*, or the act of God; this I take to be the principle established by the House of Lords in Rylands *v.* Fletcher, L. R. 3 H. L. 330. But the legislature having authorized the use of locomotive steam engines as a motive power, and having authorized the carrying the dangerous element of fire along the railways for impelling the locomotives, the common law is qualified, but conditionally only, upon the persons authorized so to use the fire, using it in a reasonable manner (such proper and reasonable manner being estimated relatively to the dangerous nature of the element and the combustible nature of the materials with which it is brought into proximity), and using all the appliances known to science, and taking all reasonable precautions to prevent the fire escaping, and to prevent, also, combustible material upon their property becoming ignited by fire from the engine coming in contact therewith, and so extending into the property of a neighboring proprietor;—in fact conditional upon their adopting all such known appliances and precautions as may reasonably be required to prevent damage to the property of third persons near which the railway passes, and if they are guilty of any default in the discharge of this duty, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with, and consuming the property of, such third persons, or is caused to the property of such third persons by fire communicated thereto from property of the railway company themselves which had been ignited by fire escaping from the engine coming directly in contact therewith; Pigott *v.* Eastern Counties R. Co., 3 H. & N. 743; and in the Exchequer Chamber, 5 H. & N. 679; Fremantle *v.* L. & N. W. R. Co. 10 C. B. N. S. 90; Jones v. Festiniog R. Co., L. R. 3 Q. B. 737; Smith *v.* L. & S. W. R. Co., L. R. 5 C. P. 98; and in the Exchequer Chamber, L. R. 6 C. P. 14.

"We are of opinion," says Bramwell, B., when delivering the judgment of the court of exchequer in Vaughan *v.* Taff Vale R. Co., 3 H. & N. 752, "that the statute 14 Geo. 3c. 78 does not apply where the fire originates in the use of a dangerous instrument, knowingly used by the owners of the land in which the fire breaks out."

And in that case in the Court of Exchequer Chamber, 5 H. & N. 688, while reversing the judgment of the Court of Exchequer upon the ground that, as it was found as a fact that the

defendants were guilty of no negligence, no action lay, Cockburn, C.J., states the principle upon which these actions rest thus:

"Although it may be true that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of negligence in the mode of dealing with the animal or using the instrument, yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it is authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence that if damage results from the use of such thing independently of negligence, the party using it is not responsible. And Blackburn, J., says: "Rex *v.* Pease has settled that when the legislature has sanctioned the use of locomotive engines, there is no liability for injury caused by using them, so long as every precaution is taken consistent with their use."

The principle of liability then being, that unless every precaution is taken to prevent injury occurring from the fire in the locomotive engine, the party neglecting to take such precaution cannot claim the protection of the statute which authorizes the use of the engine, but is subject to the same liability as he would have been liable to at common law, apart from the statute, for such reason, the statute 14 Geo. 3 c. 78 has no application. This it will be observed, also, is the same point as is decided by the judgment in Filliter *v.* Phippard, *ubi supra.*

Questions to be determined —Evidence of negligence.

In these actions, therefore, against railway companies for compensation for damage occasioned by fire proceeding from their engines in the use of them as sanctioned by law, the inquiry always is: Have they complied with the condition subject to which alone the use of the fire, in the manner in which it is used by them, is authorized, and by compliance with which they can alone relieve themselves from liability? Have they used the destructive element under their control with that degree of care which was reasonably requisite, in view of the danger to be apprehended of inflicting injury, and which the circumstances in each case called for? Negligence, as said by Willes, J., in Vaughan *v.* Taff Vale R. Co., 5 H. & N. 688, is the absence of care according to the circumstances. In this case the evidence clearly proved, and indeed upon this point there was no dispute, that the property of the plaintiff was set fire to by fire directly communicated to it, proceeding from a freight shed of the defendants which was on fire and which was situate just across a street in the village of Chippewa, which separated the property of the defendants' from that of the plaintiff, and there was abundant evidence to go to the jury upon the question whether in point of fact this freight shed

was or not, set fire to by sparks issuing from an engine of the defendants' which had passed there immediately before the breaking out of the fire in the shed. The defendants' contention at the trial was, that the smoke-stack of the particular engine had attached to it a perfect netting or screen to prevent sparks escaping. But there was evidence of the strongest character that a shower of sparks did in fact escape from the smoke-stack precisely as the engine passed the shed, and fell on the platform all around about and upon and against the freight shed, and the witnesses of the defendant admitted that if this evidence was true, the netting could not have been perfect, what they plainly intended to convey thereby being that, in their opinion, it was not true. The evidence upon this point however, if believed, was quite sufficient to justify the jury in finding, and they did believe it to be true, and accordingly found as a fact, that the freight shed was set fire to by sparks escaping from the smoke-stack, and that those sparks escaped by reason of the apparatus for arresting sparks having been out of order; they also found that, having regard to the dryness of the season, the engine was taken past the shed, which was quite close to the track, under too heavy pressure of steam, such heavy pressure having the tendency to cause sparks to escape, and that the state in which the freight shed was (there having been evidence that its floor was saturated with oil, and that the building itself, which was of wood, was very dry and inflammable), was not such a condition as, having regard to its proximity to passing trains, should have been permitted. That there was evidence to go to the jury upon all of these points, and which, if believed (and of its truth they were the sole judges), was sufficient to support these findings, cannot, I think, be doubted; it is therefore unnecessary to consider whether their finding that "as it was a special train, and on Sunday when employees were not on duty, there should have been an extra hand on duty," if it stood alone, would be a sufficient finding of negligence to support a verdict in favor of the plaintiff.

Remote fires—Liability in case of—Authorities.

The learned counsel for the appellants strongly contended that as the plaintiff's buildings were ignited, not by sparks proceeding directly from the engine, and falling on the buildings of the plaintiff, but by fire proceeding from the freight shed, the damage so done to the plaintiff's property was too remote to justify a verdict against the defendants. In support of this contention, he relied upon a case of Ryan *v.* New York Central R. Co., 35 N. Y. Rep. 210, decided in the court of appeals of New York in 1866, which certainly does appear to lay down very distinctly such a proposition. In that case the New York Central R. Co., by the negligent manner of conducting an engine, or by the de-

fective condition of the engine, set fire to a quantity of wood in one of their own sheds; the fire consumed the wood shed and spread to, and consumed, the house of the plaintiff situate about 180 feet distant from the shed, and the court held that the plaintiff had no cause of action against the railroad company, on the ground that the plaintiff's injury was not the necessary or natural consequence of, nor the result ordinarily to be anticipated from, the negligence committed, that the plaintiff's injury was the remote and not the proximate result of the fire in the wood-shed, and too remote to give a cause of action. In Webb *v.* Rome, Watertown & Ogdensburg R. Co., 49 N. Y. R. 420, however, the same court differently constituted in 1872, citing and relying upon Vaughan *v.* Taff Vale R. Co., 5 H. & N. 688, and Smith *v.* London & S. W. R. Co., L. R. 5 C. P. 98, held that where coals were negligently dropped from an engine of the defendant's which set fire to a tie, from which the fire was communicated to an accumulation of weeds, grass, and rubbish, which lay on the side of the track, and thence spread to the fence and into plaintiff's woodland, burning and destroying his trees, the plaintiff was entitled to recover. In the report of Smith *v.* London & S. W. R. Co. in the Common Pleas, there is something in the language of Brett, J., who dissented from the majority of, the court, which, upon a cursory view, appears also to give countenance to the appellants' contention. He says there, L. R. 5 C. P. at p. 102:

"I take the rule of law in these cases to be that which is laid down by Alderson, B., in Blyth *v.* Birmingham Waterworks Co., 12 Ex. at p. 784, 'negligence is the omission to do some thing which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.'"

And again at p. 103: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge, and pass across the stubble field, and so go to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road on its passage. It seems to me that no duty was cast upon the defendants in relation to the plaintiff's property, because it was not shown that the property was of such a nature and so situate that the defendants ought to have known that by permitting the

rummage and hedge trimmings to remain on the banks of the railway they placed it in undue peril.

And again: "I am of opinion, as matter of fact, that no reasonable man could suppose—or at least eight out of ten would fail to suppose—that if by any means the rummage and hedge trimmings on the side of the railway were set on fire, the fire would extend to a stubble field adjoining, and so proceed to a cottage at the distance before mentioned."

And he concludes thus: "I think that the defendants cannot reasonably be held responsible for not having contemplated such an extraordinary combination of circumstances or such a result. For these reasons I am of opinion that there was no such evidence of negligence on their part as could properly be left to a jury."

Now, it is to be observed that these remarks of the learned judge as to the remoteness of the damage, and as to its not being reasonably (within the contemplation of a prudent and careful man) such a natural consequence of the rummage and hedge trimmings being left where they were, as to make the leaving of them such negligence as, standing alone, in the absence of any evidence whatever of negligence in the mode in which the fire was used, and its escape guarded against, should render the defendants liable, are made by the learned judge to justify the conclusion at which he had arrived, that no evidence of negligence proper to be left to a jury was produced. His remarks are not at all addressed to the consideration, whether if there was evidence that the fire in the rummage and hedge trimmings had been occasioned by a negligent use of the fire carried in the locomotive, and by its being permitted to escape by reason of some negligent defect in the engine, or its screen, or of some other negligence in the conduct of the engine, the fact of the fire having been communicated to the plaintiff's property through the medium of the fire spreading from the rummage and hedge trimmings along the ground through the stubble field to the plaintiff's house, and not by sparks emanating from the engine directly striking the plaintiff's house and setting fire to it, would make the injury to the plaintiff in such case to be too remote to constitute a cause of action. This distinction is plainly pointed out in the case when in the Exchequer Chamber, L. R. 6 C. P. 21, where Channell, B., says:

"I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not; but if it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

And Blackburn, J., who entertained doubts similar to those which had been entertained by Brett, J., says:

"I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."

And after stating the grounds of his doubts of their being sufficient evidence of negligence in that case, he says:

"I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge, but I doubt on this point, and therefore doubt if there was evidence of negligence. If the negligence was once established, it would be no answer that it did much more damage than was expected."

Now in the case before us, there was, as I have already said, abundant evidence which, if believed, justifies the finding of the jury that the fire in the shed was occasioned by sparks emanating from the smoke-stack by reason of the apparatus for arresting sparks being out of order, and that the engine should not have been taken past the freight house in that dry season under such a heavy pressure of steam, and as it appears that the plaintiff's buildings were ignited and consumed by sparks conveyed from the burning freight shed, I am of opinion that the injury sustained by plaintiff is a damage naturally consequential upon, and resulting from, the defendants' negligence found by the jury, and for which the defendants are in law responsible.

Injury a damage naturally consequent.

I express no opinion upon the point, as it does not arise upon this record: whether damage sustained by another person whose buildings may have been destroyed by fire proceeding from the plaintiff's burning buildings, or from an intermediate building of a third person, whose building had been ignited by fire proceeding from the plaintiff's building, being carried by the wind to the property of the plaintiff, would or not, be too remote to constitute a good cause of action against the defendants? Whether or not in such case the negligence of the defendants could be said to be *causa causans* of such damage? It may be that there must be some point where, in a fire so spreading from house to house, the liability of the defendants ceases even though their negligence be the cause of the occurring of the first fire. In the case of a fire so spreading, it may be that in the case of a building far removed from that in which the fire first broke out becoming ignited by fire, proceeding from an intermediate building, there may be some circumstances to be taken into consideration as constituting the *causa*

Where liability for spreading fire ceases.

causans of the damage, which would distinguish that case from that of the fire, as in the case before us, proceeding directly from the defendants' shed, but such a point does not arise upon this record. It is stated it is true, in the appellant's factum, that a number of actions have been brought against the defendants, and that it has been agreed that the defendant's liability in those actions shall be determined by the result of this present one. This circumstance, however, cannot authorize us to import into the consideration and determination of this case, any facts not actually appearing in evidence in the case. It may be that the facts in the other cases are identical with those appearing in this case. It may be that in some of the other actions the facts are in some particulars different. How this may be we know not. To all cases similar in their facts to the present, our judgment will, of course, under the agreement referred to, naturally apply; and if the agreement affects cases, the facts of which may be materially different from those appearing in the present case, that is a matter over which we have no control, and with which we cannot interfere.

Upon the facts, as they appear in the present case, I am of opinion that the damage of which the plaintiff complains is damage naturally consequential upon, and resulting from, the negligence from the defendants as found by the jury, and that the appeal should be dismissed with costs.

Sufficiency of Spark-arresters.—See Moxley *v.* Canada Atlantic R. Co. 32 Am. & Eng. R. R. Cas., 304. note, 319.

Liability of Company Where Fire Spreads.—See Louisville, etc., R. Co. *v.* Ehlert, 11 Am. & Eng. R. R. Cas. 61; Pittsburg, etc., R. Co. *v.* Noel, 7 Ib. 524; Butcher *v.* Vaca Valley, etc., R. Co., 22 Ib. 644; Pennsylvania, Co. *v.* Whitlock, 22 Ib. 629, note 637; Simmonds *v.* New York, etc., R. Co. 23 Ib. 369; Johnson *v.* Chicago, etc., R. Co., 13 Ib. 460. For a full discussion of this subject, see 8 Am. & Eng. Encyc. of Law, tit, FIRES CAUSED BY THE OPERATION OF RAILWAYS, I.

HASELTINE

v.

CONCORD R. CO.

(*New Hampshire Supreme Court, July* 19, 1888.)

Fire Caused by Locomotive—Personal Property—Statutory Provision.—Under a statute which provides that railroad companies shall be liable "for all damages which shall accrue to any person or property by fire or steam" from any locomotive, the owner of personal property destroyed by a fire caused by a locomotive may recover damages although such personalty was only temporarily left near the railroad track and was liable to be changed at any time.

Same—Insurable Interest.—Although a railroad company has by statute an insurable interest in all property on the line of its road exposed to damage by fire or steam from its locomotives, the right of an owner whose property has been destroyed by fire is not affected by reason of the fact that the company has been unable to obtain insurance upon the property consumed.

Same—Evidence—Competency—Other Fires.—In an action to recover damages for the destruction of property by fire from a particular locomotive, evidence tending to show that other fires were set about the same time by the same engine is competent.

ACTION on the case to recover damages for the burning of personal property, consisting of coal, wood, etc., which constituted part of the plaintiff's stock in trade, and was situated on land adjoining defendant's railroad. The plaintiff was in the habit of selling the property destroyed from day to day, and replenishing his stock from time to time as necessary. The defendant excepted to the refusal of the court to charge that they were not liable for the loss of personal property temporarily left near its track, and which was liable to be changed from time to time. Evidence was admitted over objection, which showed that about a week after the destruction of the plaintiff's property, fire was found in the grass near the track soon after the particular locomotive, which plaintiff claimed had caused the fire to his premises, had passed.

W. L. Foster and *H. G. Sargent* for plaintiff.

Chase & Streeter and *Bingham & Mitchell* for defendant.

CARPENTER, J.—The statute upon which the action is founded provides that "the proprietors of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such

road" Gen. Laws, c. 162, § 8. It makes no distinction between different kinds of property. Under it, in Rowell *v.* Railroad, 57 N. H. 132, 58 N. H. 514; Smith *v.* Railroad, 63 N. H. 25; and under the similar statute of Vermont (Gen. St. c. 28, § 78), but much more favorable to position taken by the defendants; and in Railroad Co. *v.* Richardson, 91 U. S. 454,—recoveries were had for the destruction by fire of lumber and other personal property. In Laird *v.* Railroad, 62 N. H.—, all the property destroyed was personal, and the principal part of it consisted of a stock of goods. The plaintiff's right of recovery does not depend upon the defendants' ability to obtain insurance upon the property consumed. The defendants have by the statute an insurable interest in all property on the line of their road exposed to damage by fire or steam from their locomotives or other engines. Gen. Laws, c. 162, § 9. Whether they procure or can procure insurance is immaterial. The testimony tending to show that other fires were set about the same time by the same engine was competent. Boyce *v.* Railroad, 43 N. H. 627; Smith *v.* Railroad, 63 N. H. 25; Railroad Co. *v.* Richardson, 91 U. S. 454. Judgment on the verdict.

Statutory provisions—Personal property.

Insurable interest.

Other fires.

BLODGETT, J., did not sit. The others concurred.

Proof of Fires Caused and Sparks Emitted at Other Times.—See Steele *v.* Pacific Coast R. Co. 32 Am. & Eng. R. R. Cas. 333, note, 338.

Insurable Interest.—A statute making a railroad company liable for damages caused by fire and giving it an insurable interest in the property liable to be injured does not limit a recovery against it to such property as is usually regarded as insurable. Grissell *v.* Housatonic R. Co. (Conn.) 32 Am. & Eng. R. R. Cas., 349.

Fire Set by Locomotive—Wood-yard—Former Fires.—In an action against a railroad company for negligence, for setting fire to cord-wood, it was held that the fact of a fire having occurred in the wood-yard previous to the building of the railway, was entirely irrelevant. Longabaugh *v.* Virginia City & T. R. Co. 9 Nev. 271.

Respecting fires set by railroad engines, see generally, *post*, Galveston, & S. A. R. Co. *v.* Horne, 238, and note, 242–246; St. Louis, & S. F. R. Co. *v.* Fudge, 246, and note, 249–250; and, *ante*, Canada Southern R. Co. *v.* Phelps, 207, and note, 235.

For a very exhaustive discussion of the subject of railroad fires generally, see 7 Am. & Eng. Enyc. of L. *tit.* FIRES CAUSED BY THE OPERATION OF RAILWAYS.

Fire Set by Locomotive—Title to Property.—In an action to recover damages for the destruction of hay by a fire caused by a railroad locomotive, it was shown that the land upon which the grass was grown and the hay cut did not belong to the plaintiff, but to a third person. Plaintiff obtained authority from a person, who claimed to act as the proprietor's agent, to cut the grass for the purpose of making hay; but there was no evidence which tended to show that such an agent had any authority in writing from the proprietor to act in her behalf. There was, however, evidence which tended to show that the proprietor ratified and confirmed

the acts of her alleged agent. It was *held* that the plaintiff was not a trespasser but entered into possession, under at least a parol license, and having expended labor in making the hay, she was, under the ruling in Murphy *v.* Railroad Company, 55 Iowa 473, entitled to recover. The plaintiff's husband testified on cross-examination that he put up one stack of hay for "himself individually." The jury found that the hay belonged to the plaintiff, and it was urged that it necessarily followed that the verdict was against the weight of the evidence. It was held that it was for the jury upon the whole evidence, to decide to whom the hay or any portion of it belonged; and that, on appeal, the court could not say that the verdict was not sufficiently supported. Bulliss *v.* Chicago, M. & St. P. R. Co. (Iowa), 39 N. W. Rep. 245.

As to sufficiency of evidence of ownership, see St. Louis & S. E. R. Co. *v.* Weelis, 72 Ill. 538; Reed *v.* Chicago, M. & St. P. R. Co. (Wis.), 32 Am. & Eng. R. R. Cas. 320.

GALVESTON, HARRISBURG AND SAN ANTONIO R. CO.

v.

HORNE.

(*Texas Supreme Court, February 7*, 1888.)

Fires Caused by Locomotives—Action for Damages—Jurisdiction.—Under the provision of the Texas Revised Statutes that suits against any private corporation may be commenced in any county in which such corporation has an agency or representative, and that suits against a railroad company may be brought in any county through or into which the railroad of such corporation extends, an action to recover damages for the destruction of grass by a fire caused by a locomotive may be brought in a county through which the company operates its line and at the county seat of which it has an agent, although the property destroyed was situated in another county.

Same—Continuance—Absence of Witnesses.—An affidavit, in an action to recover damages for the destruction of property by a railroad fire, setting forth that absent witnesses would prove the value of the property destroyed to have been much less than the plaintiff claimed is not sufficient to warrant the granting of a continuance if it does not specify how much less such witnesses would state the value of the property to have been.

Same—Evidence of Negligence—Presumption—Escape of Sparks.—In Texas, if it is proved that a fire was caused by the escape of sparks from a locomotive engine, such testimony is sufficient *prima facie* to establish the negligence of the company.

Same—Damages—Growing Grass.—In an action to recover damages for the burning of growing grass, the value of the grass at the place at which it was grown is the proper measure of damages, and the plaintiff is entitled to interest, upon the value of the property so destroyed, from the date of its destruction.

APPEAL from District Court, Colorado County.

Action by W. F. Horne against the Galveston, Harrisburg & San Antonio R. Co., to recover damages for injuries caused by

a fire alleged to have been set by one of defendant's engines. Defendant appeals from a judgment for plaintiff.

Brown & Dunn for appellant.

Foard, Thompson & Townsend for appellee.

WILLIE, C.J.—This suit was brought by the appellee against the appellant, to recover compensation for damages done to the former's land and grass by fire escaping from an engine passing upon the appellant's road. The land lay in Wharton county, and the suit was brought in Colorado county. The railway company pleaded to the jurisdiction upon the ground that the suit, being for damages to land, should have been brought in the county where the land was situated. This plea was sustained so far as the claim of damage to the land was concerned, but overruled as to the claim for the value of the grass consumed. This ruling was excepted to by the appellant, and forms the subject of the first assignment of error. The suit was filed on the 9th of October, 1886, and the cause was tried on the 8th of September, 1887. When the case was called for trial, the appellant moved to continue for want of the presence of material witnesses, which motion was overruled by the court, and the appellent reserved a bill of exceptions. The ruling of the court upon the motion to continue is the subject of the second assignment of error. The court gave the following charge to the jury: "If the jury believe from the evidence, that the grass growing on the land of plaintiff was destroyed by fire, caused by fire or sparks escaping from defendant's engine while passing along the road of defendant in manner and form as charged in plaintiff's petition, then these facts would make a *prima facie* case of negligence against the defendant; and such *prima facie* case can only be rebutted by the defendant showing to your satisfaction that, at the time in question, the engine was properly constructed, with the best approved appliances for preventing the escape of fire, and that the appliances were all in good repair and condition as regards the escape of fire, or that all reasonable care and caution had been taken to keep them in such repair and condition, and that the engine was carefully and skilfully handled as regards the escape of fire therefrom." This charge is alleged to be erroneous in the third assignment of error. The court also charged that the measure of damages was the value of the grass at the time it was destroyed, and in the condition it was at that time. This charge forms the subject of the fourth and fifth assignments of error. The jury found a verdict for the appellee for $4655, with 8 per cent interest from the 8th day of December, 1885; and the appellant contends that the finding is so excessive as to show that the jury were influenced by passion and prejudice in arriving at the amount of their

Facts.

verdict. The court below having entered judgment in accordance with the verdict, the defendant appealed to this court. The court did not err in overruling the plea to the jurisdiction. The twenty-first subdivision of article 1198 of the Revised Statutes provides that suits against any private corporation may be commenced in any county in which the cause of action or a part thereof arose, or in which such corporation has an agency or representative, or in which its principal office is situated; and that suits against a railroad corporation may also be brought in any county through or into which the railroad of such corporation extends or is operated. The petition alleged that the defendant operated a line of railroad through Colorado county, and had an agent at the county seat of that county. These facts were not disputed, and the defendant was liable to suit in that county for the cause of action set forth in the petition. The statute makes no exception as to suits of this character when brought against this kind of corporations, as it does in reference to individuals, and we can make none. White & W. Civ. Cas. § 701.

Jurisdiction.

The ruling upon the motion for continuance was also correct. The bill of exceptions does not show whether a continuance of the cause was sought for the first, or second, time by the defendant. The affidavit evidently attempts to comply with the requirements of an affidavit for a second continuance; but we think it insufficient in setting forth the facts which the affiant expected to prove by the absent witnesses. This is required, not only for the purpose of allowing the court to judge of their materiality, but to enable the adverse party to admit what the absent witnesses would state, and thereby prevent a postponement of the trial. This affidavit does not state with any certainty what would be the evidence of the absent witnesses. It says they would prove the value of the grass to have been much less than the plaintiff claimed. The plaintiff claimed that it was worth $5 per acre. How much less than this would the testimony of these witnesses have made its value? A person seeking a second or any subsequent continuance of a cause cannot defeat the right of his adversary to an immediate trial by making his statement of the needed evidence so indefinite as to render it uncertain what verdict the jury would find if the witnesses were present; and the jury based their verdict upon the truth of the testimony. Had the appellee admitted the truth of the proposed evidence, he could not have contradicted it at the trial by other witnesses, and the jury would have been without any guide as to the value of the grass, and the verdict would have been without evidence to support it, no matter what might be its amount. Besides, the verdict of the jury fixed the value of

Continuance—Absence of Witness.

the grass at $3.50 per acre, which was much less than that claimed by the appellee. How are we to know that the appellant was prejudiced by the absence of his witnesses, not knowing that they would have fixed its value at less than the amount recovered? There was no error in the charge complained of. It is in accordance with the decisions of this court.

There is a conflict in the decisions of England and America as to whether the escape of sparks from a passing engine is *prima facie* evidence of negligence on the part of the company running the engine. We are aware that numerous authorities can be found in which it is made the duty of the party complaining of injuries done to his property by reason of fire kindled from such sparks to show negligence on the part of the company; but we think that those decisions which throw the burden upon the company, of showing that the sparks did not escape because of any negligence on its part, are best supported by reason. They place the burden of proof upon the party having the means of producing the necessary evidence upon the subject. The employes know the condition of the engine, and of the appliances used to prevent the escape of fire, and they should be informed as to whether these were sufficient for that purpose. The injured party would not, as a general thing, be possessed of any such information, and he could not ordinarily obtain it. To require him to make the proof would in most instances be a denial of justice, and would allow the party doing the wrong to escape by concealing the facts which brought it about. Hence, our courts have adopted the salutary rule of presuming the existence of negligence against the party who has the means of disproving it, and fails to make use of them (Ryan *v.* Railway Co., 65 Tex. 20; s. c., 23 Am. & Eng. R. R. Cas. 703), and have followed that line of decisions which casts the burden of proof in such cases upon the company; and, as we believe our former decisions upon the subject are founded upon good reason, we are not inclined to change the rule assumed by them (Railway Co. *v.* Timmermann, 61 Tex. 660; s. c., 22 Am. & Eng. R. R. Cas. 648, note; Railway Co. *v.* Hogsett, 67 Tex. 685.) See also White & W. Civ. Cas. § 653, where the authorities upon both sides of the question are collated. We cannot say that the proof required to rebut the presumption of negligence was too onerous. The charge of the court in this respect seems to be in accord with the great weight of authority. It did not require that the appliances should be such as rested merely in experiment, but such as had been approved or tested by use and experience. See 1 Thomp. Neg. 154 *et seq.* But if the charge had been erroneous in this respect, it did no harm, for the *prima facie* case of negligence made out by the plaintiff was not re-

Burden of proof—Presumption of negligence.

butted by the defendant with a particle of evidence of any character whatever.

The court gave the correct measure of damages for the destruction of the grass, as has been ruled by this court in similar cases. It is only when the damage to the land is permanent that the difference in its value before and that after the fire is to be calculated. Railway Co. *v.* Johnson, 65 Tex. 393; Railway Co. *v.* Hogsett, 67 Tex. 686; Railway Co. *v.* Seymour, 63 Tex. 345. To charge the jury that they may find the value of the grass in the condition it was in when consumed includes a charge that the value at the place where it was growing is the proper measure of damages. Grass growing in the soil has no market in its then condition, except at the place where it is grown. Moreover, the evidence showed that the grass had a different value in other places from that where it was growing; and the jury find the value placed upon it at the place where it was growing and while attached to the soil. The plaintiff was entitled to interest upon the value of the property destroyed, and the jury were correct in allowing it to him, whether so charged by the court or not. The rule in such cases is the same as in an action of trespass, namely, the value of the property, with interest from the date it was lost to the plaintiff. Railway Co. *v.* Joachimi, 58 Tex. 456; s. c., 11 Am. & Eng. R. R. Cas. 539; Blum *v.* Merchant, Ib. 400.

Measure of damages.

As we cannot judicially know that the grass upon appellee's land was partly or wholly unfit for hay on the 8th of December, 1886, we cannot say that the jury were influenced by passion or prejudice in assessing the amount found by their verdict. The overwhelming weight of the evidence was to the effect that the grass was fit for hay and worth the amount found by the jury. They were citizens of the neighborhood, and better judges of the truth of the fact testified to by the witnesses than we can possibly be; and, while the verdict may seem excessive, we cannot disturb it for any reason appearing upon the face of the record. There is no error in the judgment, and it is affirmed.

Fire Set by Locomotive—*Escape of Sparks.*—The escape of fire from a locomotive raises a presumption of negligence against the railroad company. Chicago & A. R. Co. *v.* Quaintance, 58 Ill. 389; Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407; Clemens *v.* Hannibal & St. J. R. Co., 53 Mo. 366; Bedford *v.* Hannibal & St. J. R. Co., 46 Mo. 456; Ellis *v.* Portsmouth & Roanoake R. Co., 2 Ired. (N. C.) L. 138; Clevelands *v.* Grand Trunk R. Co., 42 Vt. 449; Spalding *v.* Chicago, N. W. R. Co., 30 Wis. 110. The fact that the engine emitted sparks at other times than at the time of the injury is competent. Henry *v.* Southern Pacific R. Co., 50 Cal. 176; s. c., 12 Am. Ry. Rep. 168; Crist *v.* Erie R. Co., 58 N. Y. 638; Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun (N. Y.), 128; Philadelphia & R. R. Co. *v.* Shultz, 93 Pa. St. 341; s. c., 2 Am. & Eng. R. R. Cas. 271; Nashville & Chattanooga R. Co. *v.* Tyne, 7 Am. & Eng. R. R. Cas. 515.

Same—*Presumption of Negligence.*—Where the premises are shown to have been set fire by sparks from a locomotive, the presumption of negligence arises, and the burden is on the railroad company to remove this presumption by proving that all necessary precautions were taken to avoid such mischief. Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227; s. c., 9 Am. Ry. Rep. 210; Pennsylvania R. Co. *v.* Watson, 81* Pa. St. 293; Brown *v.* Atlanta & C. A. L. R. Co., 19 S. C. 39; Burke *v.* Louisville & N. R. Co., 7 Heisk. (Tenn.) 451; s. c., 12 Am. Ry. Rep. 497; Simpson *v.* Eastern Tennessee & G. R. Co., 5 Lea (Tenn.), 456; Spalding *v.* Chicago & N. W. R. Co., 33 Wis. 582. The frequent setting of fires will justify the inference of negligence. Missouri Pacific R. Co. *v.* Kincaid, 29 Kan. 654; s. c., 11 Am. & Eng. R. R. Cas. 83.

As to presumptions and burden of proof generally, see Tilley *v.* St. Louis & S. F. R. Co. (Ark.), 32 Am. & Eng. R. R. Cas., 324, and note, 328.

Under the Iowa Code, sec. 1289, when the injury has been occasioned by a fire set in operating a railroad, the presumption is that the corporation operating the road was guilty of negligence; and an allegation of negligence in a petition to recover damages therefor is therefore redundant. Such presumption is not necessarily overcome by proof merely that the company was not negligent in operating the road; for, if the fire was set in the operation of the road, but the injury was occasioned by its negligence in some matter not pertaining to its operation, it is still liable. The presumption of liability therefor can only be overcome by proof that the company was not guilty in the matters which were the immediate cause of the injury. The court instructed the jury that, "In order for the defendant to escape from liability to pay the plaintiff's damages, . . . it is incumbent on the defendant to establish, by a preponderance of the evidence, . . . that the defendant was in nowise negligent or in fault in setting out or in causing the fire which destroyed plaintiff's property, and so far as causing said fire was concerned it operated its railway in a reasonable, careful, and prudent manner." It was held that the instruction was not open to the objection that it subjected the defendant to liability for the consequence of but slight negligence, whereas the rule was that it should be held to ordinary care and diligence. Engle *v.* Chicago, M. & St. P. R. Co. (Iowa), 37 N. W. Rep. 6.

Same—*Unusual Quantity of Sparks.*—The fact that the engine threw out an unusual quantity of fire is sufficient to overcome any direct evidence given that it was in good order, or, if in good order, that it was skilfully managed by the engineer. Chicago & N. W. R. Co. *v.* McCahill, 56 Ill. 28.

Same—*Other Fires.*—It has been said that the mere fact that fire was occasioned by sparks from an engine does not make a *prima facie* case against the railway company, because the burden is on the plaintiff to show negligence on the part of the defendant. See Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316; Pennsylvania R. Co. *v.* Watson, 81* Pa. St. 293.

The negligence of the company must either be proven directly or by circumstances. McCummons *v.* Chicago & N. W. R. Co., 33 Iowa, 187; Gandy *v.* Chicago, N. W. R. Co., 30 Iowa, 420. While a single fire may not afford sufficient evidence to warrant a finding of negligence against a railroad company, yet, where it appears that at or about the same time several other fires were caused by the same engine, and that only at or about that time were any fires caused by such engine, will be sufficient to justify a jury in finding that the defendant was guilty of negligence in the management of the engine. Missouri Pac. R. Co. *v.* Kincaid, 29 Kan. 654; s. c., 11 Am. & Eng. R. R. Cas. 83.

Thus, it has been held that, where a person sues a railroad company for negligently permitting sparks to escape from its engine, and thereby sets

fire to his property, if it is claimed by the plaintiff that the defendant's engines are not in proper condition to prevent the escape of sparks, it is competent for the court to permit the plaintiff to introduce evidence on the trial tending to show that other fires were caused by sparks escaping from defendant's engine immediately before or after the time that the fire complained of occurred, because such evidence would clearly tend to prove that the defendant's engines were "not properly constructed, or were out of repairs." St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47; Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115; s. c., 11 Am. Ry. Rep. 210; Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271. And, where an action is brought against a railroad company for negligently setting fire to cord-wood by coals dropped or sparks emitted, it was held competent for the witness to testify that, a few weeks after the fire complained of, another fire was caused on the same road by coals dropped from another engine of the same company. Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271.

Same—*Defective Engines.*—Where the railroad company uses a locomotive without a screen over the smoke-stack to arrest the sparks it is sufficient evidence of negligence to go to the jury in an action for damages caused by the fire originating from such engines. Bedell *v.* Long Island R. Co., 44 N. Y. 367. See Freemantle *v.* London & N. W. R. Co., 10 C. B. N. S. 89; s. c., 100 Eng. C. L. 88. The railroad company is required to operate its road with engines so constructed as to cause the least danger. King *v.* Morris & E. R. Co., 18 N. J. Eq. (3 C. E. Gr.) 397.

It is not necessary for the company to show, in the defence of such action, that the engine is supplied with the best and most approved appliances to prevent fire, if it is made to appear that the engine is properly constructed and in good order at the time. See Chicago & N. W. R. Co. *v.* Boller, 7 Ill. App. 625. However, where a fire is set by an engine, burden is upon the company to show that such engine was properly constructed, equipped, and operated. The question of such construction and equipment is one of fact for the jury. Burlington & M. R. R. Co. *v.* Westover, 4 Neb. 268.

As to the use of spark-arresters which will prevent fire from escaping, see Monlex *v.* Canada A. R. Co., 14 Ont. Rep. Rep. 309; s. c., 32 Am. & Eng. R. R. Cas. 304, and note 317.

Same—*Sufficiency of Evidence.*—In an action for damages against the railroad company for so negligently managing its engines as to communicate fire to standing grass and crops of the plaintiff's, the burden of proof is upon plaintiff to show that the fire was caused by the negligence of the defendant. Smith *v.* Hannibal & St. J. R. Co., 37 Mo. 287; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316; Pennsylvania Co. *v.* Watson, 81* Pa. St. 293. It was held in Piggot *v.* Eastern Counties R. Co., 3 M. G. & S. 294; s. c., 54 Eng. C. L. 219, that the fact of premises being fired by sparks, emitted from a passing engine is *prima facie* negligence on the part of the company, rendering it incompetent for such company to show that some precaution had been adopted reasonably to prevent accident.

Evidence which shows that a fire occurred soon after a train passed plaintiff's land, that dry weeds and grass were permitted to accumulate on the right of way at and about the place where the fire occurred, and that at the time and before the fire occurred it was not unusual for the company's engines to throw sparks and coals of fire on its right of way, is sufficient to support a finding by the court that the fire was occasioned by the negligence of defendant. Missouri Pac. R. Co. *v.* Ayers (Tex.), 8 S. W. Rep. 538.

A suit was brought to recover damages for two fires, one of which was occasioned by negligence whereby sparks were cast upon plaintiff's premises, and the other by negligence in permitting combustible matter to accumulate on the right of way, which took fire and communicated it to the

plaintiff's premises. The testimony showed, as to the first fire, that it occurred soon after a train passed the premises; that the fire started on the bank of a railroad cut and upon the boundary of plaintiff's premises, and travelled away from the railroad towards the premises; and that the engines on the road sometimes threw sparks forty feet beyond the right of way. It was shown that the weeds and grass on the right of way were not burned by the first fire. After the second fire, the weeds and grass on the right of way were found to have been partially burned. It was held that there was sufficient evidence to justify a finding that the fires were caused as charged. Norfolk & W. R. Co. *v.* Bohannan (Va.), 7 S. E. Rep. 236.

Where the facts disclosed show that a fire started in an open field belonging to plaintiff, about 60 feet from the railroad track and far from any building or highway, immediately after the passing of a locomotive and train, that a strong wind was blowing from the south and the fire started north of the track, and that there was no apparent cause of the fire except the passing train, they are sufficient to justify the conclusion that the fire complained of was set by the train. The statutory presumption of negligence on the part of defendant was held not to have been rebutted on the ground that the general fireman of the mechanical department of the defendant company testified that the engine was fitted with an improved spark-arrester, which was supposed to be cleaned out at intervals of thirty to forty miles; that it was not possible for sparks to escape through this spark-arrester if it was properly cleaned out; that fire could not get out of the ash-pan while the engine was in motion; and that, if a fire was set by an engine, it would necessarily have been out of repair;—such testimony tending to show, if anything, that the engine was out of order in some part, and to establish, rather than rebut, the defendant's negligence. Dean *v.* Chicago, M. & St. P. R. Co. (Minn.), 40 N. W. Rep. 270.

Where the only evidence offered by the defendant to rebut the presumption of negligence consisted of the affidavits of defendant's master-mechanic that certain engines were inspected, and the stack-ends, ash-pans, and dampers were in good condition, it is insufficient if the other evidence does not disclose whether the fire complained of was caused by fire from any of those engines. Missouri Pac. R. Co. *v.* Texas & P. R. Co., 33 Fed. Rep. 360.

Same—*Contributory Negligence.*—In an action to recover damages for a fire, set by a railroad company, the court instructed the jury that, "If plaintiff's own negligence directly and proximately contributed to his own injuries, then he cannot recover; but in order to defeat his right to recover, there must be such contributory negligence on his part as directly and proximately contributes to produce the injuries, and without which his loss would not have been sustained." It was held that, although the language of the last clause of the instruction did not state the rule of law established by the Iowa courts, the defendant could not have been prejudiced by the instruction—as by the decision of the court, in West *v.* Chicago & N. W. R. Co. (Iowa), 32 Am. & Eng. R. R. Cas. 339. A railroad company cannot escape liability by showing that the plaintiff was guilty of contributory negligence in exposing his property. Engle *v.* Chicago, M., St. P. R. Co. (Iowa), N. W. Rep. 6. See, *post*, Louisville & N. R. Co. *v.* Schuster, and note.

Same—*Measure of Damages—Destruction of Grass-roots.*—In Missouri P. R. Co. *v.* Ayers (Texas), S. W. Rep. 538, it was held that, in addition to the value of the grass burned, the plaintiff was entitled to recover for the destruction of the grass-roots whereby the ground was rendered less productive of grass during his tenancy than it would have been had the fire not occurred.

Destruction of Orchard.—In Norfolk & W. R. Co. *v.* Bohannan (Va.), 7 S. E. Rep. 236, the plaintiff sued to recover damages for the destruction of an orchard of fruit-trees, and it was held that the measure of damages was not the cost of replanting the trees the first proper season for planting after burning, and the value of the care and labor expended on the trees before the burning, with interest thereon from the time it was expended, but the value of the property destroyed. In that case two fires had occurred, and no attempt was made to ascertain the loss until after the second fire. At the trial, the defendant omitted to examine the witnesses as to the amount of the separate losses, and it was held that an instruction requiring the jury to find the amount of each loss separately was properly refused.

ST. LOUIS AND SAN FRANCISCO R. CO.

v.

FUDGE.

(*Kansas Supreme Court, June* 9, 1888.)

Railroad Fire—Pleading and Proof—Defective Engine.—A plaintiff sued a railway company for negligently permitting fire to escape from its engine, and causing injury to his property, and alleged the negligence as follows: "The servants, agents, and employees of said defendant, in operating and running its engine over said line of road near the premises of plaintiff, in said county, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass, and other combustible material on defendant's right of way, and set fire thereto, which spread onto and over the said land of plaintiff." The defendant filed a motion to require the plaintiff to make his petition more definite and certain, which motion was overruled by the court. *Held*, that the foregoing allegations of negligence cannot be construed as including an allegation that the railway company's engine was defective.

Same—Special Findings—Verdict.—In such case, where the jury, in answer to questions as to how the fire was permitted to escape, answered as follows: "Either by negligence of engineer, or some defect in engine, or both, the evidence does not warrant us in saying which." *Held*, that as no defect in the engine was alleged, and as the fire may have escaped wholly by reason of some defect in the engine, it was error for the trial court to render judgment in favor of the plaintiff upon such finding.

ERROR to District Court, Greenwood County.

G. P. Fudge brought an action in the district court of Greenwood county against the St. Louis & San Francisco R. Co., in which action he filed the following original petition, omitting title and signature, to-wit: "The plaintiff alleges that the defendant at the time hereinafter mentioned was a duly incorporated railroad company, doing business in the State of Kan-

sas, under and by virtue of the laws of said State, and operating its railroad through Greenwood county, its right of way being 100 feet in width along the line of said road. Said railroad is located near the premises of plaintiff in said county; and on the 4th day of September, 1881, said defendant, contrary to its duty in that regard, carelessly and negligently omitted to keep said right of way free and clear from dry and combustible material, but negligently permitted large quantities of dry grass and weeds to accumulate over and upon its said track and right of way near the premises of plaintiff. That on said day the servants, agents, and employees of said defendant, in operating and running its engine over said line of road near the premises of plaintiff, in said county, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass and other combustible material on defendant's right of way, and set fire thereto, which spread onto and over the said land of plaintiff, to-wit, the north-west quarter of section twenty-four, in township twenty-eight, range eleven, and the south-west quarter of section thirty-five, in township twenty-seven, range eleven, all in Greenwood county, Kan., the fire being continuous; and thereon burned up and destroyed one hundred tons of hay, the property of plaintiff, to the value of $3 per ton, without any fault or negligence on the part of plaintiff, to his damage in the sum of $300. Wherefore plaintiff prays judgment against said defendant for the sum of $300, and the costs of this action." The other facts of this case are sufficiently stated in the opinion of the court.

Mansfield, Eaton & Pollock and *John O'Day* for plaintiff in error.

T. L. Davis for defendant in error.

VALENTINE, J.—This was an action brought in the district court of Greenwood county by G. P. Fudge against the St. Louis & San Francisco R. Co. to recover damages for the destruction of certain hay by fire alleged to have been caused by the negligence of the railway company. The only negligence alleged is stated in the plaintiff's petition as follows: (1) "Said defendant, contrary to its duty in that regard, carelessly and negligently omitted to keep said right of way free and clear from dry and combustible material, but negligently permitted large quantities of dry grass and weeds to accumulate over and upon its track and right of way, near the premises of plaintiff." (2) "The servants, agents, and employees of said defendant, in operating and running its engine over said line of road, near the premises of plaintiff, in said county, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom, into the dry grass and other com- Facts.

bustible material, on defendant's right of way, and set fire thereto, which spread onto and over the said land of plaintiff." The defendant filed a motion to require the plaintiff to make his petition more definite and certain, which motion was overruled by the court. The defendant then demurred to the plaintiff's petition upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was also overruled by the court. The case was then tried before the court and a jury, and a verdict and judgment were rendered in favor of the plaintiff, and against the defendant, for $200 damages and costs of suit, and the defendant, as plaintiff in error, brings the case to this court for review. With respect to the first item of alleged negligence, the jury found, as shown by their special findings, in favor of the defendant and against the plaintiff; and with respect to the second item of alleged negligence the jury found as follows: "(11) Did the fire escape by accident? *Answer.* No. (12) Did the fire escape because of the negligence of the engineer? *A.* (No answer.) (13) Did the fire escape by reason of the engine being out of order? (No answer.) *A.*, to both twelfth and thirteenth. Either by negligence of engineer, or some defect in engine, or both. The evidence does not warrant us in saying which." "(28) If the jury return a verdict for the plaintiff, they will state specifically what negligence the defendant was guilty of, upon which the jury base the verdict, whether defective engine, condition of right of way, or negligence of the defendant's servants in operating the train. If on account of defective engine, state in what particular it was defective. If on account of the condition of the right of way, state what the defendant did or omitted to do that constitutes the negligence. If on account of the negligence of the defendant's servants, state what they did, or omitted to do, constituting the negligence of the defendant. *A.* Negligence of defendant's servants or defect in engine in setting out two fires within a mile, within a few minutes, as shown by the evidence."

The principal ground urged for reversal in this case is that the judgment of the court below was rendered upon a case not made by the pleadings; or, in other words, that the act of the court in rendering the judgment was a substantial departure from the issues as made by the pleadings. If this ground for reversal is made manifest by the record, of course the judgment of the court below must be reversed. Brenner *v.* Bigelow, 8 Kan. 496; Railway Co. *v.* Young, Id. 658; Railway Co. *v.* Dunmeyer, 19 Kan. 539; Railroad Co. *v.* Irwin, 35 Kan. 286. As has already been stated, only two items of negligence are alleged in the plaintiff's petition,—the first of which cannot count for anything now, for which respect to that item the jury found against the

Pleading and proof—Defective engine.

plaintiff. With respect to the other item, the jury found in the alternative that the negligence of the company consisted either in the negligence of the engineer, or in some defect in the engine, or both, and this it found merely because of two fires originating from the engine within one mile and within a few minutes. Now, for the purposes of this case, but without deciding the question, it may be admitted that the plaintiff alleged, by its general allegations of negligence, that the engineer was negligent; but it cannot be said upon the most liberal rules of construction that the plaintiff alleged that the engine was in any manner defective. But liberal rules of construction cannot be indulged in in this case in favor of the plaintiff; for before the trial, even before the defendant answered, it moved the court that the plaintiff be required to make his petition more definite and certain, and also demurred to the plaintiff's petition. Stewart *v.* Balderston, 10 Kan. 131, 149. From anything appearing in the case, there may not have been the slightest negligence on the part of the engineer or on the part of any other person operating that engine; and yet the only negligence alleged against the defendant in this second allegation of negligence was, "In operating and running its engine," etc. No defect in the engine was alleged, nor was the slightest notice given to the defendant that the plaintiff claimed that any such defect existed, or that any evidence would be introduced tending to prove any such defect. The plaintiff alleges that the defendant was negligent, through its "servants, agents, and employees," "in operating and running its engine," etc.; and the burden of proving this negligence, if there was any, rested upon the plaintiff, but he did not prove the same. There is no claim now made that any servant, agent, or employee of the railroad company was negligent in operating the engine except the engineer, and the jury found, in answer to the 12th and 13th special questions, that the evidence did not warrant them in saying that the engineer was negligent. From anything appearing in the case, the fire may have originated wholly and entirely by reason of some defect in the engine, and, if so, the plaintiff cannot recover, for the reason that no such defect was alleged. We think the contention of the plaintiff in error, defendant below, must be sustained, and therefore the judgment of the court below will be reversed, and the cause remanded for a new trial.

All the justices concurring.

Railroad Fires.—See, *ante*, Haseltine *v.* Concord R. Co., 236, and note, 237–238; Galveston, H. & S. A. R. Co. *v.* Horne, 238, and note, 242–246.

Pleadings.—In an action to recover damages for property destroyed by a fire set by a locomotive, the petition contained no allegation that the engineer and firemen were unskilful, but alleged that the defendant permitted

the engine to be out of "repair and carelessly and negligently used." The court charged the jury that "negligence is defined as want of ordinary care; and may be evinced . . . in various ways," such as "the employment of unskilful or careless engineers or firemen; . . . and if you find from the evidence that the defendant 'carelessly and negligently managed its road' in this respect, and that by reason of such negligence a fire was set out, the defendant is liable." It was held that as this charge submitted to the jury the question whether the engineer and firemen were unskilful, it was not supported by the pleadings and was therefore improperly given. Babcock *v.* Chicago & N. W. R. Co. (Iowa), 40 N. W. Rep. 628.

In Bullis *v.* Chicago, M. & St. P. R. Co. (Iowa), 39 N. W. Rep. 245, the plaintiff sued to recover damages for the destruction of certain hay by fire, and the petition alleged that the defendant negligently set the fire by means of fire from its locomotive engine. The court instructed the jury in substance that if the defendant's employees in charge of the engine were competent and skilful, and the engine was properly operated and properly equipped, their verdict should be for the defendant. It was held that although there was no charge in the petition that the employees of the defendant were unskilful, the general statement in the petition of the negligence required the court to submit to the jury all questions which the evidence tended to establish, and the instruction in question was properly given.

See, generally, as to sufficiency of allegations of negligence, Pittsburgh, C. & St. L. R. Co. *v.* Hixon, 110 Ind. 225; s. c., 32 Am. & Eng. R. R. Cas. 374.

STATE *ex rel.* CITY OF MINNEAPOLIS

v.

MINNEAPOLIS AND ST. L. R. CO. *et al.*

(*Minnesota Supreme Court, September* 14, 1888.)

Highway Crossings—Bridges—Mandamus—Joint Trial of Actions.—*Mandamus* proceeding against the Minneapolis & St. Louis R. Co. to compel it to bridge its tracks where they cross city streets, and to construct approaches to such bridges at one end of the same. The Manitoba Railway tracks cross the same streets so near to those of the other company as to suggest the necessity, if either system of tracks should be bridged, that the bridges be made continuous over all the tracks of both companies. A like *mandamus* proceeding was pending against the Manitoba Co. to compel it to construct those parts of the bridges over its tracks with approaches thereto. Both causes were required to be tried together. *Held* not to be error.

Same—Alternative Writ—Amendment—New Parties.—It was not error to allow an amendment of the information and alternative writ, and to bring in the Manitoba Co. as a party in the proceeding against the St. Louis Co., the former company claiming some interest in one of the tracks of the latter, to which the proceeding relates.

Same—Mandate—Form—Specification of Work.—The manner in which the duty of restoring the streets should be performed being uncertain, the mandate of the court may properly be specific in that regard.

Same—Necessity of Works by Another Company.—The fact that it is necessary, for the accomplishment of the purposes in view, that the Manitoba Co. shall also bridge its tracks, is not a fatal objection to this *mandamus* proceeding against the St. Louis Co., the former company having been in fact required to construct the bridges over its tracks. State *v.* Railway Co., 35 Minn. 131, and same parties, 36 N. W. Rep. 870, followed upon several points there decided.

Same—Restoration of Street—Charter—Construction.—Charter of the Minnesota Western R. Co. (Sp. Laws 1853, c. 66) construed as imposing a continuous duty as to restoring public streets to usefulness, by bridging or otherwise, when necessary.

Same—Grade Crossing—Duty to Construct Bridge.—The fact that a railroad has once been lawfully constructed upon the grade of a street does not exempt it from bridging when that becomes necessary.

Same—Statute—Construction—Existing Railroad.—Special act of 1879 (chapter 185), authorizing the St. Louis Co. to construct branch lines and tracks, and requiring the city to build the approaches to necessary street bridges, construed as not applicable to the already existing line of road.

Same—Manner of Construction.—Statutes of 1887 (chapter 15), relating to highway crossings by railroads, construed as intended to provide how grade crossings should be constructed, but not as authorizing all crossings to be at grade.

Same—Restoration of Street—Establishment of Grade—Mandamus.—*Mandamus* proceedings may be prosecuted to determine the mode in which the respondent shall be required to restore a street, and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the level which the relator claims should be adopted.

Same—Municipal Corporation—Resolution of Council—Validity.—Upon a report to a municipal council by one of its committees, recommending certain action to be taken by the council, a record of the proceedings of the council in the word "adopted" expresses the will of the body that the course recommended be pursued.

Same—Costs of Bridging Street—Apportionment.—Each company was properly required to construct those parts of the bridges above their own systems of tracks respectively, and approaches upon their respective sides, without other apportionment between them of the cost of the entire bridge structures and approaches.

Same—Bridge—Necessity—Evidence.—In view of the necessity that bridges be built over both systems of tracks, if over either, evidence was admissible in proceedings against one company as to the extent of the use of the street crossing by the other company, showing the necessity for a bridge at the place in question.

Alteration of Track—Power of Court.—The power of a court (if it exists) to require a considerable and important lateral change in the location of railroad tracks (which had been long before lawfully laid across a public street), in order to restore the street to a proper condition of usefulness, should not be exercised unless that is reasonably necessary.

APPEAL from District Court, Hennepin County.

Application for writ of *mandamus*. The opinion states the case.

J. D. Springer, *F. D. Larrabee*, and *H. S. Abbott* for Minneapolis & St. Louis R. Co.

Benton & Roberts and *M. D. Grover* for St. Paul, Minneapolis & Manitoba R. Co., appellants.

Seagrave Smith and *Judson N. Cross* for City of Minneapolis, respondent.

DICKINSON, J.—For the sake of brevity we will, in this opinion, designate these two railroad corporations as the St. Louis Co. and the Manitoba Co., respectively. This *mandamus* proceeding was originally commenced against the St. Louis Co. to compel that corporation to construct bridges upon Washington avenue, Third, Fourth, and Fifth streets north, in the city of Minneapolis, above its railroad tracks, which, running easterly and westerly, now cross those streets upon the same level as the streets themselves. The work proposed also included the construction of approaches to the southerly ends of these bridges, upon these streets, above their present grade, and beyond the lands which the corporation has acquired for its purposes. It was also contemplated that the railroad track should be lowered, so as to allow the bridges to be constructed with a less elevation above the grade of the streets than would otherwise be necessary. The tracks of the Manitoba lie next northerly from and parallel with those of the St. Louis Co., and cross these streets in the same direction. The two systems of tracks are, however, separated, a hundred feet or more, by lands which the Manitoba Co. has acquired for its purposes. When this cause came on for trial, a similar proceeding had been commenced against the Manitoba Co. to compel that corporation to construct bridges over its tracks and its intervening lands, with approaches at their northerly ends. These separate proceedings against the two corporations contemplated that the work thus charged upon them separately should, when performed, constitute entire and complete bridges over both systems of tracks, with proper street approaches. The proceeding against the Manitoba Co., after judgment against it in the district court, was brought to this court by appeal. Our decision upon that appeal, affirming that of the district court, is reported in 36 N. W. Rep. 870. During the trial of this proceeding against the St. Louis Co., it appearing that the Manitoba Co. claimed some interest in one of these St. Louis tracks, and the only one of its tracks which crosses Washington avenue, it was ordered by the court, upon the motion of the relator, and with the consent of the Manitoba Co., that the relator's information and the alternative writ be amended so as to make the Manitoba Co. a party respondent. The St. Louis Co. objected. After the trial of the cause, the court having ad-

Facts.

judged that a peremptory writ of *mandamus* should issue against the St. Louis Co., requiring the prosecution of the work in question, in general accordance with the plan of the relator, set forth in its information, but with some particular modifications, both of the respondent corporations appealed.

The appeal of the St. Louis Co. will be first considered. Without referring specifically to the 83 assignments of error made by this appellant, many of which present questions which were involved in and determined by the decision in State *v.* Railway Co., 35 Minn. 131, and in the case of the same parties, 36 N. W. Rep. 870, we propose to direct attention to such of the subjects referred to in these assignments as seem to us to require particular mention in this opinion. The allowance of the amendment bringing in the Manitoba Co. as a party respondent was not error; the statute authorizes this practice. Gen. St. 1878, c. 80, § 9; Ib., c. 66, § 43. It was proper in this case, in order that that company might be concluded in respect to the proposed changes in the track to which it had or asserted some right. At the time of the trial of this proceeding against the St. Louis Co., the like proceeding against the Manitoba Co., above referred to, being then pending and ready for trial, the court ordered both cases to be tried together, the St. Louis Co. objecting. In this we see no abuse of the discretion of the court, in view of the peculiar nature of these causes, the similarity, and to a large extent the identity of the questions to be considered, and of the evidence bearing upon them, and of the fact that in determining either case regard should be had to the determination in the other; for obviously neither respondent should be required to construct sections of bridges over its tracks unless the sections over the tracks of the other company should also be constructed. There was no consolidation of the cases, but the evidence in both was received at the same time. A great deal of testimony, covering several hundred printed pages, had already been taken in the St. Louis case before a referee, which the Manitoba Co. appears to have allowed to be read as evidence in its case. We think that the circumstances would have justified a joint proceeding against both companies. It admits of no question that, in general, *mandamus* may be resorted to as a means of compelling the performance of a duty such as is claimed by the relator to rest upon this railroad company; and it has been resorted to in this State in cases like that now under consideration. State *v.* Railway Co., 35 Minn. 131; same parties, 36 N. W. Rep. 870. It is urged by this appellant, as an objection to the writ in this case, that it prescribes particularly the manner in which the alleged duty shall be performed, instead of allowing the respondent to adopt its

Joint trial—Amendment—New parties.

Mandamus—Specification of work.

own plan for restoring the usefulness and safety of these streets. Where, as in this case, it has been in no manner determined, either by the law, by the circumstances of the case, or otherwise, how the alleged duty should be performed, the course suggested by this contention of the respondent would be subject to most obvious objections. It may be assumed that where it is necessary to resort to compulsory process of the courts in such cases, it is because there is a disagreement between the pulic authorities and the respondent as to the duty of the latter to do anything, or as to what its duty requires it to do. Neither of the parties thus opposed in interest can determine these matters of difference. It is for the courts to decide. State *v.* Railway Co., 35 Minn. 131; 28 N. W. Rep. 3. It is expedient that the thing to be done be effectually determined before a peremptory writ be issued, and that the party upon which the duty may be found to rest be required to do that specific thing, which, when done, must be accepted as the performance of its duty. If the writ were to command generally the performance of the duty of restoring the street to a condition of safety and usefulness for public travel, the respondent being left to select its own plan and means of accomplishing this result, it might be found, after much time and money had been consumed in carrying out the plan adopted by the respondent, that it was not such as to accomplish the public purposes in view. The court might so decide, and command the work to be undertaken anew. In People *v.* Railroad Co., 58 N. Y. 152, the writ was made specific, the respondent claiming to have already performed its duty in the premises. The same reasons which suggest the propriety for making a writ specific in such a case are equally applicable in any case where the nature of the thing to be done is uncertain and can only be determined by the judgment of the court. It was the more clearly necessary in this case that the plan for restoring these streets be judicially determined, and the writ made specific, from the fact that the purposes of the proceeding could only be accomplished by the adoption of one plan for both of these respondents, so that the work of each should be the complement of that of the other, the whole forming complete bridges adapted to the necessities of the public. Under our statute (Gen. St. 1878, c. 80, § 9), allowing amendments of the writ and answer as in respect to pleadings in civil actions, and prescribing that the issues be tried and further proceedings had in the same manner as in civil actions, this proceeding is sufficiently elastic to enable the court to determine upon trial the plan which ought to be adopted to accomplish the ends in view. It is said that the accomplishment of the purposes contemplated by this proceeding is contingent upon the Manitoba Co. being required to

Necessity for work by Manitoba Company.

bridge its tracks in accordance with the same plan. This suggests the expediency of one proceeding against both companies; but, as the case stands, and as the Manitoba Co. has been required to so proceed, that contingency is not deemed to be a reason for setting aside the determination in this case.

We deem the decisions of this court, above cited, to be decisive of several important points urged by the appellant, such as the duty to construct necessary bridges; the continuous nature of the respondent's duty in respect to the restoration of the streets; the right to compel the sinking of its tracks for this purpose, and without compensation; the construction of street approaches extending along the streets in front of property owned by other persons; and the objection based upon the necessity for acquiring other lands, for the purpose of necessary retaining walls—unless the result should be affected by the charter of this company, or other statutory provisions, or of other circumstances, to which we are about to refer. It is claimed, in view of the provisions of the act incorporating the Minnesota Western R. Co. (chapter 66, Sp. Laws 1853, § 8), to which this respondent traces its corporate authority, that the continuous obligation which has been decided to rest upon the Manitoba Co. in respect to restoring the usefulness of public streets by bridging or otherwise is not chargeable upon this respondent. The difference in the corporate laws of the two companies do not justify this position. The language and reasoning of the court in the decision referred to (35 Minn. 131; 28 N. W. Rep. 3) are as applicable to the provisions of this charter as to that which was construed in the above decision. The same right to construct the railroad across public highways is given in both charters. In the Manitoba charter the further duty is expressed to "put such highway . . . in such condition and state of repair as not to impair or interfere with its free and proper use." The corresponding provision in the St. Louis charter is to "restore such road, highway . . . to its former state, or in a sufficient manner not to impair its usefulness to the owner or to the public." Again, it is claimed that by force of chapter 185, Sp. Laws 1879, this company is relieved from the duty of constructing the approaches to such bridges, that burden being expressly imposed upon the city. This is entitled "An act to authorize and empower the Minneapolis & St. Louis R. Co. to construct and operate a branch line of railroad from the city of Minneapolis to some point on the south shore of Lake Minnetonka, and construct and operate branch lines and spur tracks in the city of Minneapolis." Section 1 authorizes that corporation to construct "a branch line of railroad from some point on its present line in the city of Minneapolis," using any part

Restoration of street—Construction of street.

of its already existing line for that purpose, to Lake Minnetonka. Section 2 authorizes the location and construction, within the city, of any "extensions and branches that may be necessary to connect said road, or its present road, with any and all railroads; . . . and may also build, maintain, and operate extensions, branches, and spur tracks from any of its lines now or hereafter built, to any mills, or manufactories, or other industries requiring railway facilities, . . . with all necessary side tracks, turn-outs, and connections." Section 4 contains the proviso "That the grades of the tracks of said railroad, where the same shall cross any public street in the said city of Minneapolis, shall be such as shall be designated and fixed by resolution of the common council; . . . and in case any such crossing shall involve the necessity of a bridge to allow of any street passing under or over any such railroad, then such company shall pay the expense of the construction and maintenance of the abutments, excavations, and superstructures of such bridge, and the city shall pay the expense of the construction and maintenance of the street approaches to said bridge." The branch line, constructed under this authority, may be designated as the "Pacific division" of this road. This diverged from the main line (which had been constructed long prior to 1879) at Hopkins, a place some distance westerly from the premises in question, and ran westerly from that place. From Hopkins to Minneapolis, the trains of this Pacific division run over the main line. Some of the side tracks, crossing Fourth and Fifth streets, were put in after the passage of the act of 1879. All of these tracks—the main line track and the terminal side tracks—are also used for the business of the Pacific division. The court found that none of the tracks in question were constructed as any part of the Pacific division, and had no special relation thereto more than to its main line. The court also considered the above proviso to be unconstitutional so far as it related to the expressed obligation of the city. It is not necessary for us to pass upon the constitutionality of the law. The fact as found by the court is justified by the case, and we are of the opinion that the proviso has no applicability to the tracks in question so as to relieve the respondent from the duty resting upon it prior to the passage of that act. The act does not disclose a purpose to change the rule of law in this respect as to the then existing railroad; and, as the proviso under consideration, in its most natural construction, is applicable merely to the line or tracks to be constructed under the authority of that act, it must be considered that as to the main line of road, and its proper side and terminal tracks then existing or thereafter constructed under its original charter, the duty of the company was unchanged by this act of 1879. The fact that the newly authorized line

used these tracks for its business would not bring them within the operation of the proviso. Chapter 15, Gen. Laws 1887, is appealed to as authorizing the respondent to maintain its crossings upon the present grade of these streets. This act cannot be construed as intended to make that radical change in the law contended for by the respondent. We think it was intended only to apply to cases where grade crossings were proper, and not to declare that all crossings might be at grade. In such cases as are contemplated by the act, it prescribes how the crossing shall be made. The terms of the law do not justify the conclusion that the legislature intended to require or to allow all railroad crossings to be upon the grade of the streets, in the most frequented portions of our large cities where there are many tracks in constant use, as well as at ordinary country highway-crossings. The fact that respondent formerly laid its tracks, at a considerable expense, upon the grade of the streets, by the authority of the city council, does not exempt it from the duty of bridging when the increased use of both the railway and of the streets renders that necessary. State *v.* Railway Co., 35 Minn. 131. From the fact that the city has not yet changed the grade of these streets so as to conform to the plan of the proposed bridges, it does not follow that this compulsory proceeding may not be maintained. The city authorities had no power to compel these corporations to adopt the plan which they might deem best; and since, as has been decided, it could only be finally determined by judicial decision what the corporations should be compelled to do, it is obvious that any fixing of grade for these bridges, by the action of the city council, prior to the decision of the controversy as to whether the corporations were under obligation to bridge the streets, and, if so, how it should be done, would have been speculative, and subject to such changes as might become necessary as the result of the decision of the court. The authority of the court to determine the necessity and the mode of carrying these streets over the tracks necessarily involves the power to determine the elevation or grade of the bridges; and to this extent the power given by the city charter to the city council to establish and change the grades of streets must be regarded as qualified. The evidence shows, as we consider, that the city council did adopt the plans and grade shown in the information. These plans having been reported to the city council by a committee of that body, with the recommendation that the same be adopted by the council and that the city attorney be instructed

Grade crossing—Duty to maintain bridge.

Fact that city has not yet changed grade immaterial.

Report of council of municipality.

to commence proceedings in court for their enforcement, the action of the council thereupon is expressed in its records by the word "Adopted." This expresses the adoption by the council as its will of what was thus recommended. Whether this was necessary, we do not decide.

Some assignments of error are based upon the fact that this appellant is charged with the duty of constructing these parts of the bridges extending over its own tracks, and the approaches on the south side, without proof that the cost of doing this is a fair, ratable proportion of the cost of the entire work charged upon both companies, and without due regard to the proportionate use made of these street-crossings by the two companies respectively. We do not think that the case is such as to have required or justified such an apportionment of the burden as is suggested by the appellant. Although the duty of these companies, respectively, to bridge over their tracks, arises from the use of the street-crossings, the extent of the burden in this respect to be borne by each company is not legally measured by the extent of that use. The necessity being shown, the duty rests as absolutely upon the St. Louis Co. to bridge its own track at Washington Avenue as it does upon the Manitoba Co. in respect to its four or more tracks across that street, even though the use of the latter is four, or ten, times greater than that of the former. That duty being absolute, and resting upon that company independently of the duty upon the other corporation, it may be required to perform it. And so as to the approaches, the duty is of the same absolute nature. Ordinarily, where a railroad company is required to bridge its tracks, it may also be required to make proper approaches at both ends of the bridge. Here the bridges of each of these companies over their respective systems of tracks form approaches upon one side to the bridges of the other company, so that upon each street only one graded approach is required leading up to the bridge structure which each company is required to construct. In view of the independent nature of the obligation of each company to bridge its own track, we think that each company was properly required to construct the approach to its own bridge as a proper part of its own peculiar work. We have spoken of the duties of these companies as being independent, and not joint. This is not to be confounded with the plan of manner or performance, which, as respects both companies, should, for obvious reasons, be in some sense and to some extent common, or at least similar. In this connection we refer to the point that evidence was received, against the objections of this appellant, not only of the extent of the

Cost of bridging street—Apportionment.

use of these crossings by the trains of that company, but also by those of the Manitoba Co. This was properly received as bearing upon the question whether a bridging of these tracks had become necessary for the purposes of the public in the use of these streets. The circumstances were such as to justify the conclusion that, whenever a bridge across either system of tracts should become necessary, it would be necessary that it extend over both systems. As bearing upon the needs of the public for bridges upon these streets, the evidence was admissible, although what the Manitoba Co. might do in the use of its tracks was in no respect to be attributed to the St. Louis Co. as its act. It was admissible for the same reason that proof might have been made, as was in fact done, of the extent of travel upon the streets. State *v.* Railway Co., 35 Minn. 131; 28 N. W. Rep. 3. As to the two south spur tracks of the St. Louis Co., leading to certain private warehouses, we see no error in the action of the court. It is left to the option of the company to sink them so as not to interfere with the bridges, or to remove them. That company cannot complain because the court gave it this option, and did not dictate which should be done, or decide whether it was practicable to pursue the former of these alternatives. There are other questions presented, involving the sufficiency of the evidence to sustain the findings of the court and the propriety of the action and determination of the court in matters requiring the exercise of its judgment and discretion, which we will not specifically refer to. We see no substantial error in respect to anything material to this cause. Several of the assigned errors in respect to matters relating to the proposition requiring the removal, laterally, of the St. Louis track, it is unnecessary to examine, since the determination in respect to this subject is in favor of this appellant.

Necessity of bridge—Evidence.

Upon the appeal taken by the Manitoba Co., the only point requiring separate and particular mention is that relating to the removal of the St. Louis main track, as proposed by the Manitoba Co., and the use by the St. Louis Co., in lieu of that track, of the tracks of the Manitoba Co., more than a hundred feet north of that main track, and away from the side tracks and station grounds of the St. Louis Co. The original findings and opinion of the court below upon this point are shown in State *v.* Railway Co., 36 N. W. Rep. 870. Afterwards the court further found, in this case, that the proposed plan for a removal of the St. Louis track was satisfactory to the relator; that it was a reasonable plan, and better for each respondent, as well as for the public, than any other plan proposed to the court. And the court further stated that it would have requested this change to be

Alteration of track—Power of court.

made were it not for the considerations expressed in this language: "But as we find that the streets can be restored to reasonably good condition for public travel, in accordance with relator's plan as modified, without disturbing the location of said main track of the St. Louis Co., it is our opinion that this court has no power to require that company to change the location of its main track so as to conform to that plan." The case now presented is not essentially different in this respect from that presented upon the former appeal of the Manitoba Co., the decision in which is above referred to. It is not necessary now, as it was not then, to decide whether under any, or under what, circumstances a railroad company can be compelled to thus relinquish its right of way and go elsewhere. It is enough to say, as was said in substance in the decision last cited, and as the court below seems to have considered, that such a power (if it exists) must depend upon such a course being reasonably necessary to restore or preserve the proper usefulness of the street. This is a condition which the findings expressly exclude from this case. The idea expressed by the court below is that, because there was no necessity for requiring such a relinquishment, the court had no power to do it. It is at least true that in such a case it ought not to do it; and, in a view of the decisive facts that this was not necessary in this case, and that the plan determined upon satisfies the requirements of the public and is acceptable to the relator representing the public interests, the decision was right. We do not think that the interest which the Manitoba Co. may have in this track affects the result in this particular. It is said that there is a clerical error in the mandate respecting the grade at a certain point. We do not understand that the record before us is such as to enable us to correct that error; and application for that purpose may properly be addressed to the court below. Judgment affirmed.

Highway Crossings—Duty of Company to Make.—Generally it is the duty of a railway company to construct, maintain, and repair crossings where the railroad intersects a public street or highway at grade. See People *v.* Chicago & A. R. Co., 67 Ill. 118; Farley *v.* Chicago, R. I. & P. R. Co., 42 Iowa, 234; Paducah & E. R. Co. *v.* Commonwealth, 80 Ky. 147; s. c., 10 Am. & Eng. R. R. Cas. 318; Ferguson *v.* Virginia & T. R. Co., 13 Nev. 184; State *v.* Dayton & S. E. R. Co., 36 Ohio St. 346; s. c., 5 Am. & Eng. R. R. Cas. 312; Pittsburgh, F. W. & C. R. Co. *v.* Dunn, 56 Pa. St. 280; Buchner *v.* Chicago, M. & N. W. R. Co., 60 Wis. 264; s. c., 14 Am. & Eng. R. R. Cas. 447; and this includes the repairing of embankments, which are a necessary part of the crossing. Farley *v.* Chicago, R. I. & P. R. Co., 42 Iowa, 234. And if a railroad company fails to construct and maintain crossings, the remedy is by mandamus (see People *v.* Chicago & A. R. Co., 67 Ill. 118; Attorney-general *v.* Great Northern R. Co., 4 De G. & S. 75; Attorney-general *v.* London & S. W. R. Co., 3 De G. & S. 439, or by indictment. Paducah & E. R. Co. *v.* Commonwealth, 80 Ky. 147; s. c., 10 Am. & Eng. R. R. Cas. 318; Pittsburgh, V. & C. Co. *v.* Commonwealth,

101 Pa. St. 192; s. c., 10 Am. & Eng. R. R. Cas. 321. Whether the railroad company has properly constructed the crossing so as to render it as convenient and little dangerous as possible, is a question for the jury. Roberts *v.* Chicago & N. W. R. Co., 35 Wis. 679.

Same—*Approaches to Crossings.*—The railroad company is bound to keep the approach to such crossing in a safe condition. Maltby *v.* Chicago & W. Mich. R. Co., 52 Mich. 108; s. c., 13 Am. &. Eng. R. R. Cas. 606. The company is bound to construct and maintain highway crossings, even though the highway was laid out after the construction of the railroad. Louisville, N. A. & C. R. Co. *v.* Smith, 91 Ind. 119; s. c., 13 Am. & Eng. R. R. Cas. 108. And such crossings and approaches must be constructed, repaired, and improved so as to meet the increasing wants and demands of the public. English *v.* New Haven & N. R. Co., 32 Conn. 241; Cooke *v.* Boston & L. R. Co., 133 Mass. 185; s. c., 10 Am. & Eng. R. R. Cas. 328; Manley *v.* St. Helens, Can. & R. Co., 2 H. & N. 840.

The obligation of the railroad to construct and maintain crossings begins when the railroad is laid out over the public highway, or *vice versa.* See Pittsburgh, V. & C. R. Co. *v.* Commonwealth, 101 Pa. St. 192; s. c., 10 Am. & Eng. R. R. Cas. 321; Buchner *v.* Chicago, M. & N. W. R. Co., 60 Wis. 264; s. c., 14 Am. & Eng. R. R. Cas. 447. This obligation is a continuing duty. Chicago, R. I. & P. R. Co. *v.* Moffit, 75 Ill. 524; People *v.* Chicago C. A. R. Co., 67 Ill. 118; Evler *v.* County Commissioners of Alleghany, 49 Md. 257; Pittsburgh, F. W. & C. R. Co. *v.* Dunn, 56 Pa. St. 280. *Compare* Missouri, Kan. C. & T. R. Co. *v.* Long, 27 Kan. 684; s. c., 6 Am. & Eng. R. R. Cas. 254. And where a railroad has crossed a public highway, it is the duty of the company to restore the highway to such a condition that its usefulness for public travel will not be unnecessarily impaired. People *v.* New York, N. H. & H. R. Co., 89 N. Y. 266; s. c., 10 Am. & Eng. R. R. Cas. 230.

While a railroad company is liable for a failure to construct and maintain suitable crossings at all points where it intersects a highway or street at grade (see Farley *v.* Chicago, R. I. & P. R. Co., 42 Ind. 234), yet the company in restoring or maintaining a crossing is not bound to actually improve the highway. Beatty *v.* Central I. R. Co., 58 Iowa, 242; s. c., 8 Am. & Eng. R. R. Cas. 210.

The duty to construct and maintain crossings generally applies only to lawful public highways or streets (Missouri, K. C. & F. R. Co. *v.* Long, 27 Kan. 684; s. c., 6 Am. & Eng. R. R. Cas. 254; Flint & P. M. R. Co. *v.* Willey, 47 Mich. 88; s. c., 5 Am. & Eng. R. R. Cas. 305; International & G. N. R. Co. *v.* Jordon, (Tex., 1883), 10 Am. & Eng. R. R. Cas. 301), and such crossing is sufficient if it does not unnecessarily impair the usefulness of the highway and its enjoyment by the public. People *v.* N. Y., N. H. & H. R. Co., 89 N. Y. 266; s. c., 2 Am. & Eng. R. R. Cas. 230. The test has been said to be whether or not the crossing as constructed and maintained by the railroad unnecessarily impairs the usefulness of the highway, and interferes with the safe enjoyment of it by the public. People *v.* N. Y., N. H. & H. R. Co., 89 N. Y. 266; s. c., 10 Am. & Eng. R. R. Cas. 230.

A railroad company is not bound to construct, maintain, and keep in repair crossings of highway which have never been legally laid out and opened. Missouri, K. C. & F. R. Co. *v.* Long, 27 Kan. 687; Flint & P. M. R. Co. *v.* Willey, 47 Mich. 88; s. c., 5 Am. & Eng. R. R. Cas. 305. Yet where the railroad has licensed a public highway of such a crossing, it is bound to maintain and repair. Kelly *v.* Southern Minnesota R. R. Co., 28 Minn. 98; s. c., 6 Am. & Eng. R. R. Cas. 264.

Same—*Bridges and Footways.*—The duty to construct and maintain crossing imposes upon a railroad company the duty to repair bridges which constitute a highway crossing (Southern & N. A. R. Co. *v.* McLendon, 63

Ala. 266), and footways. Queen *v.* Manchester R. Co., 2 Eng. R. & Canal Cas. 711.

Same—*Duty of Lessee.*—The lessee of a railroad takes it subject to the duties imposed by law for the protection of the public. See McCall *v.* Chamberlain, 13 Wis. 641; Linfield *v.* Old Colony R. Corp., 64 Mass. (10 Cush.) 562; s. c., 57 Am. Dec. 124.

Same—*Liability of Receiver.*—An action at law based upon Rev. Laws, § 3383, can be maintained against the receiver of a railroad company, for negligence in constructing a crossing, although leave was not obtained of the court of chancery to bring it. Town of Roxbury *v.* Central Vermont R. Co. (Vt.), 14 Atlantic Rep. 92; s. c., 6 New Eng. Rep. 534.

Same—*Grade Crossing—Revocation of Contract.*—In Appeal of Philadelphia, Wilmington & Baltimore R. Co. (Pa.), 15 Atl. Rep. 476, it appeared that the city of Chester was, by statute, empowered to grant to the Philadelphia, Wilmington & Baltimore R. Co. the use of certain streets and alleys. The city by an ordinance authorized the railroad company to occupy a certain street, and in consideration of such permission, the railroad contracted and agreed to erect over its track where the street crossed the same at certain specified grades an iron bridge, and donate the said bridge with its appurtenances to the city. It was *held*, that such contract was within the power of the municipality, that it was bound by it, and it could not remove the bridge against the will of the company after it had been constructed.

Same—*Sufficiency of Crossing—Statutory Requirements.*—A statute which enacts that a crossing over a highway shall be so constructed "as not to impede the passage or transportation of person or property along the same," is sufficiently complied with if a crossing is so constructed as not to injure the reasonable passage of persons and property, or as not unnecessarily interfere with the public highway, it being impossible to construct a crossing which shall not in some degree impede the travel and the provisions of the statute being rendered nugatory by any other interpretation. The facts that without a flagman the crossing would be dangerous, and that if a flagman were placed there he might be negligent in the performance of his duty, are not sufficient reasons for prohibiting a crossing under such statute. North Manheim Township *v.* Reading & P. R. Co. (Penn.), 14 Atl. Rep. 137.

Same—*Change of Highway.*—Under a statute which declares that if any railroad company finds it necessary to change the site of any public road, it shall cause the same to be reconstructed on the most favorable location, and "in as perfect a manner as an original road;" a railroad which has changed a public road will be required to fence the new road, if it appears that such fencing is required from the situation, e.g., by reason of an embankment,—and is necessary to make the road as safe as the old road. North Manheim Township *v.* Reading & P. R. Co. (Penn.), 14 Atl. Rep. 137.

A charter conferred upon a company the right to build its railroad across highways, provided it restored the highway thus intersected as nearly as practicable to its former state of usefulness. The statutes of the State, at the time when the charter was granted, required highways to be good and sufficient. The company having constructed its road across the highway in such a manner as to render an approach to the crossing necessary, the court *held*, that it must be presumed that the highway previously to the construction of the railroad fulfilled the statutory requirements, and that fences being necessary for the purpose of making the new approaches good and sufficient, the company must under its charter construct the necessary fences along the approaches. It was also held, that the word "crossing," as applied to the intersection of a common highway and a

railroad, as used in the statute, meant the entire structure, including the approaches, although a part of the structure might be extended beyond the lines of the railroad lands, or the place where the roads actually cross each other. The court further held, that the obligation to restore was constant until performed; and that the railroad company could not protect itself against such liability, on the ground that the statute of limitations would bar an action for the original construction. It was also *held*, that the fact that the selectmen of the town had made various repairs upon the highway was not sufficient to establish such an exceptance as would relieve the company from its obligation. Town of Roxbury *v.* Central Vt. R. Co. (Vt.), 6 N. Eng. Rep. 534; 14 Atl. Rep. 92.

Same—*Construction of Crossing.*—When a statute provides that all railroad companies must make such highway crossings "as the circumstances of the case and the public safety may require," the nature of the crossing is not governed by the public safety alone, but by what is practicable, in the judgment of a competent engineer, to be done for the purpose of carrying out the objects of the railroad company. The Delaware statute provides that no approaches to a railroad crossing shall be of a heavier grade than five degrees, and that such approaches shall be protected by sufficient railings or guards. *Held*, in an action against a railroad company for damages for a personal injury received by one driving upon a highway approach to a railroad crossing, that the question as to whether the company was guilty of negligence in respect to such approach, by reason of delay in erecting railings thereto, after having made the approach by a filling, was a question for the jury; that the fact that the company did not begin to erect the railings until the day of the accident, although the filling had been completed some three months before, was not of itself negligence, if it would have been impracticable or premature, on account of the settling of the filling, etc., to erect the railing sooner. *Held*, also, that the company would be responsible for the injury (in the absence of contributory negligence on the part of the plaintiff) if the approach to the crossing was of a heavier grade than that limited by the statute, provided such excess in grade caused the accident. Kyne *v.* Wilmington & N. R. Co. (Del.), 14 Atl. Rep. 922.

HUMESTON AND SHENANDOAH R. CO.

v.

CHICAGO, ST. PAUL AND KANSAS CITY R. CO.

(*Iowa Supreme Court, May* 26, 1888.)

Crossing—Grade—Underway—Injunction.—In a suit to enjoin one railroad company from constructing a grade crossing over the track of another, it appeared that the track of the plaintiff, upon one side of the point where it was proposed to construct the crossing, had been constructed upon a heavy grade, and that if trains were stopped within 200 feet of the crossing as required by the statute, it would be impossible for them to gain sufficient momentum before reaching the ascending grade to carry the trains over it, whilst on the other hand trains coming the other way would be required to stop on the descending grade; and that this would be attended

with many difficulties, and would occasion constant danger of collision. It was shown that an under crossing could be constructed at a cost of less than $15,000 in excess of the cost of a crossing at grade. *Held*, that under the provisions of the Iowa statute, which authorizes any railroad company to carry its railroad across or under any other railway, and requires such company to so construct its crossing as not unnecessarily to impede the travel on the railway crossed, the plaintiff was entitled to an injunction.

Same—Unnecessary Expense.—The fact that the defendant company had, pending the proceedings, constructed various works at a cost of about $6000, which would become useless in the event of an under crossing being decreed, is not sufficient reason for the refusal of an injunction.

APPEAL from District Court, Ringgold County.

Plaintiff owns and operates a line of railroad, the *termini* of which are at Humeston, in Wayne county, and Shenandoah, in Page county. Defendant is engaged in constructing a railroad between Des Moines and Kansas City, which will cross plaintiff's road in the valley of West Grand river, in Ringgold county. It was proceeding to construct a crossing at grade, when plaintiff brought this action for the purpose of compelling it to adopt either an over or under crossing. This appeal is by defendant, from an order made by the judge in vacation allowing a temporary injunction.

Hubbard & Dawley for appellant.

W. W. Morseman for appellee.

REED, J.—Plaintiff's complaint, in substance, is that the operation of its road would be unnecessarily and unreasonably impeded, and the dangers incident to its operation greatly increased by a grade crossing at the point selected by defendant. The track of plaintiff's road is level for the distance of 300 feet east and 900 feet west of the proposed point of crossing. Commencing at a point 1000 feet east of that point, and extending to within 300 feet of it, there is an ascending grade of 37 feet per mile, and commencing 900 feet west of the point there is an ascending grade for 7000 feet varying from 6 feet to 70 feet per mile. The provison of the statute prescribing and governing the rights of the parties is found in section 1265 of the Code, which is as follows: "Any such corporation may construct and carry its railroad across, over, or under any railway, canal, or watercourse, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct its crossing as not unnecessarily to impede the travel, transportation, or navigation upon the railway, canal, or stream so crossed. . . ." The inquiry in the case is whether the travel and transportation would be unnecessarily impeded by the construction of a grade crossing at the point selected by defendant for crossing its track. Under chapter 163, Acts 20th, Gen. Assem., rail-

Facts.

Statutory provisions.

road companies whose track intersects or is intersected by other railroad tracks on the same level are required to bring all trains to a stop before reaching the crossing. Under that requirement grade crossings necessarily have the effect to impede to some extent travel and transportation on the lines. But the right to construct and maintain such crossings under proper conditions is clearly recognized both by that chapter and section 1265, and the inconvenience and delay which arise from their use under such circumstances must be borne by the companies whose business is thus interfered with. But by the latter section the duty is imposed upon the company constructing the intersecting line to so construct the crossing as not unnecessarily to interfere with the operation of the other road, and whether a crossing at grade would in any case amount to an unneccessary obstruction of the business, must be determined from the circumstances of that particular case. The condition of the track, the grades at and near the point of intersection, the relative cost of of an over or under crossing as compared with that of a grade crossing, and the increase of danger in the operation of the road, are proper matters to be considered. It is very apparent from the foregoing statement as to the grades in plaintiff's track near the point of intersection that the operation of its trains will be greatly impeded if a crossing at grade should be maintained. All trains approaching the crossing from the east must, under the requirements of the statute, be brought to a stop not less than 200 feet from it. They must necessarily be stopped on the ascending grade. The difficulty of starting a heavy train under such circumstances is known to all persons who have had any opportunity to observe the operation of railroads; and, in addition to this, would be the difficulty of acquiring sufficient momentum before reaching the ascending grade to the west of the crossing to carry the train over it. The trains approaching from the west would necessarily be required to stop on the descending grade. This would be attended with many difficulties, and there would be constant danger of collision upon the crossing. The cost of an over crossing in excess of that of one at grade would be $50,000 or more, and its construction would necessitate a grade in defendant's track of 53 feet per mile. If there was no election except between an over crossing and one at grade, we might not be disposed to require defendant to incur this additional cost and the inconvenience which would arise from the construction of its track at that grade. But the evidence shows that a crossing under plaintiff's track can be constructed at a cost of less than $15,000 in excess of that of a crossing at grade, and by adopting that course the objectionable grade can be also avoided. In view of these facts, we think plaintiff should not be required to

Reasons for enjoining grade crossing.

incur the inconvenience and cost and danger which the construction of a crossing at grade would necessarily create. It is true that the business done on its road is very small in comparison with that done on the great lines of the country. Its trains are comparatively light, and the inconvenience of the grade crossing would not be as great as in the case of a more important road; but that is not controlling. The grade crossing, we think, would unnecessarily impede the travel and transportation on its road.

When the controversy first arose plaintiff filed a complaint before the railroad commissioners, who made an examination, and recommended that the crossing be constructed either under or over the track. The construction of an under crossing involves a very considerable change in plaintiff's track, but it did not at that time make anv offer to permit that change. In this action, however, it filed its consent to the making of that change. But in the meantime defendant had done work costing something over $6000, which will be valueless if the under crossing should be adopted. It was contended by appellant that plaintiff should reimburse it for that expenditure, and that it could have no standing in a court of equity without having tendered the amount. Appellant, however, made no demand for permission to make the change in plaintiff's track, but proceeded, in total disregard of the recommendation of the commissioners, to construct the crossing at grade. If plaintiff had denied the right to make the change, and defendant had made the expenditure under that denial, the cause would have been very different; but under the circumstances the expenditure must be regarded as having been voluntarily made. The order appealed from is right, and it will be affirmed.

Unnecessary expense.

See, *post*, Rochester, H. & L. R. Co. *v.* New York, L. E. & W. R. Co. 267.

Railroad Crossing—Injunction.—It is well said that every railroad corporation has its right of way subject to the right of the public to have other roads, both common highways and railways constructed across its, track, wherever the public exigency admits it. See Costa R. Co. *v.* Moss, 23 Cal. 324; East St. Louis C. R. Co. *v.* East St. Louis U. R. Co. 108 Ill. 265; s. c., 17 Am. & Eng. R. R. Cas. 163; Chicago & A. R. Co. *v.* Joliet, L. & A. R. Co., 105 Ill, 389; s. c., 44 Am. Rep. 799; 14 Am. & Eng. R. R. Cas. 62; Massachusetts C. R. Co. *v.* Boston, C. & F. R. Co., 121 Mass. 125; New York & H. R. R. Co. *v.* Forty-second St. R. Co., 50 Barb. (N. Y.) 285, 509; s. c., 26 How. (N. Y.) Pr. 68; 32 How. (N. Y.) Pr. 481; Lake Shore & M. S. R. Co. *v.* Cincinnati S. & C. R., 30 Ohio St. 604.

It is not neccessary that any express power should be given (Morris & E. R. Co. *v.* Central R. Co., 31 N. J. L. (2 Vr.) 205; the general authority to build the road being sufficient. East St. L. Connecting R. Co. *v.* East St. L. Union R. Co., 108 Ill. 265; Lake Shore & Michigan Southern R. Co. *v.* Chicago & W. Ind. R. Co., 97 Ill. 506; s. c., 2 Am. & Eng. R. R. Cas. 440; St. Louis, Jacksonville & Chicago R. Co. *v.* Springfield & N. W. R. Co., 96 Ill. 274; s. c., 2 Am. & Eng. R. R. Cas. 487; New Castle & Richmond R. Co. *v.* Peru & Indianapolis R. Co., 3 Ind. 464; Grand Rapids, Newaygo & Lake Shore R. Co. *v.* Grand Rapids & Ind. R. Co., 35 Mich. 265; Mor-

ris & Essex R. Co. *v.* Cent. R. Co., 31 N. J. L. (2 Vr.) 205; Matter of Boston, H. T. & W. R. Co., 79 N. Y. 64, 69; Lake Shore & M. S. R. Co. *v.* Cincinnati, S. & C. R. Co., 30 Ohio St. 604; Southern Carolina R. Co. *v.* Columbia R. Co., 13 Rich. (S. C.) Eq. 339.

Same—The Rights of Crossing a Railroad are Secondary to those of that crossed, and the crossing company must show by evidence that no unnecessary injury is inflicted on the other by a grade crossing, and that such crossing cannot reasonably be avoided, Pittsburgh & C. R. Co. *v.* S. W. Pennsylvania R. Co., 77 Pa. St. 173; and, where the crossing is attempted in a manner, or at a place not authorized by law, it will be enjoined. Pennsylvania R. Co.'s Appeal, 63 Pa. St. 150; Cent. Vt. R. Co. *v.* Woodstock R. Co., 50 Vt. 452; Missouri, K. & T. R. Co. *v.* Texas & St. L. R. Co., 4 Wood, C. C. 360.

Same—Grade Crossing—Necessity—Injunction.—In Appeal of Moosic & Carbondale R. Co. (Pa.), 13 Atl. Rep. 915, a preliminary injunction restraining the defendant railroad company from interfering with the plaintiff company's crossing over the defendant's road at grade was dissolved by the court of common pleas. It appeared that it was not reasonably practicable for the plaintiff company to cross otherwise than at grade. The supreme court *held* on appeal, that the decree of the court of common pleas must be reversed and the injunction reinstated. See also as to enjoining grade crossings. Baltimore & C. V. R. Extension Co.'s Appeal (Pa.), 3 Am. & Eng. R. R. Cas. 242, note 14, Ib. 78.

Same—Construction of Road—Nature of Crossing.—Under the Minnesota statute authorizing the district court to prescribe a location for the crossing of one railroad by another, the corporation whose land is taken for such a purpose is only entitled to have the place and manner of a necessary crossing so ordered as to be as little injurious to it as is consistent with the accomplishment, in a reasonable manner, of the purposes contemplated, regard being had for the interests and necessities of both corporations, as well as of the public. *In re* Minneapolis & St. C. R. Co. (Minn.), 39 N. W. Rep. 65.

ROCHESTER, HORNELLSVILLE AND LACKAWANNA R. CO.

v.

NEW YORK, LAKE ERIE AND WESTERN R. CO.

(110 *N. Y.* 128.)

Construction of Road—Filing of Map—Notice—Right of Company.—When a corporation has, as required by the New York General Railroad Act of 1850, made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceedings instituted by any land owner or occupant, such corporation has acquired a right to construct and operate a railroad upon such line in the nature of a lien upon the lands which ripens into title through purchase or condemnation proceedings, and which is exclusive as to all other railroad corporations, and free from the interference of any party.

Same—Injunction.—When a railroad company has, as required by the New York Railroad Act, filed its map and survey, it may obtain an injunction against any other railroad company attempting, by the construction of a railroad upon or across its intended route, to interfere or obstruct the construction of its track.

APPEAL from General Term of Supreme Court, Fifth Department.

Appeal by the Rochester, Hornellsville & Lackawanna R. Co. for an injunction restraining the New York, Lake Erie & Western R. Co. from laying tracks across or destroying the complainant's railroad. The Steuben special term granted an order having an injunction which was reversed by the general term on appeal. The defendant appeals from the order of the general term.

The plaintiff corporation was organized June 9, 1886, for the purpose of constructing a railroad, commencing in the village of Canisteo, Steuben county, and terminating at a point on the line of the Lackawanna & Pittsburgh R. Co. in the town of Burns, Alleghany county. It had surveyed and located the line or route of its proposed road, and had made and duly filed a map of the same. Notices were served on the occupants or owners of lands over which the road was located, including these defendants, and by no proceeding has the line so located been changed. The line, as located for some distance, was along lands of the defendant corporation, upon which its tracks were laid. Plaintiff has acquired the right of way for the greater portion of its route and is proceeding, in good faith and with diligence, to acquire the land necessary for its route and to construct its road. At the portion of its line where it adjoined the defendant's lands, and on the lands of the defendant Babcock, the defendant corporation, after it had been served with the notice of plaintiff's proposed route, constructed a switch from its tracks across the plaintiff's line to a brickyard, taking a lease from Babcock for three years of a piece of land between its road and said brickyard. After the defendant company had constructed its switch the plaintiff caused the track to be taken up and removed and laid down a section of its own track, on which it also placed rails, and procured and served an injunction restraining the defendant company from interfering with its roadbed; but defendant, in disregard of the injunction, on the same day, tore up and removed plaintiff's section of track. The plaintiff had not yet purchased the right of way across Babcock's land, nor had it instituted proceedings to condemn the same. Defendant Babcock, after receiving the notice from plaintiff of the filing of the maps, etc., commenced proceedings to change the plaintiff's route, which was ultimately dismissed for want of jurisdiction. The injunction obtained by the plain-

tiff was dissolved at special term; but, on appeal, the general term reversed the order of the special term and restored the injunction. From the order of the general term, restoring the injunction, the defendant company has appealed to this court.

James H. Stevens, Jr., for appellant.

Frank S. Smith for respondent.

GRAY, J.—The learned judge at special term vacated the injunction theretofore granted restraining the defendant corporation from interfering with the plaintiff's roadbed, on the ground that the plaintiff had not acquired title to the land nor any right to occupy it. He stated, in his opinion, that the proceeding of defendant was "outrageous;" but considered the court could not interfere. In their opinion, the general term considered that a case had been made for the allowance of a preliminary injunction, and that the same should be continued *pendente lite*, on the ground that the plaintiff had acquired a vested and exclusive right to construct and operate its railroad on the line it had located.

Action by general term.

We think the general term were right in the view they took of the matter.

The plaintiff, by its organization under the General Railroad Act of 1850, became possessed of the franchise to construct and operate a railroad between the terminal points named in its articles, over such a line of route as it should elect. When the initial steps, pointed out in the twenty-second section of the act, had been taken, there only remained for the plaintiff to acquire, through purchase, or through proceedings *in invitum*, the right of way over the lands through which the line of route had been surveyed. By the terms of that section every company formed under the act, before constructing any part of its road through any county, must make and file a map and profile of the route intended to be adopted, and must give a written notice to all occupants of the land affected, of the time and place of filing, and that the route designated passes over the land of such occupants.

Filing of map—Notice—Rights of company.

Clearly there is involved in these provisions the intention of the legislature that, after the initial proceedings have been taken, which the statute points out as the first action of the new corporation, the lands, over which the company's route is located, shall be subjected to the right of the company thereafter to construct thereon. The legislative scheme contemplates the determination of the line of route to be in the discretion of the company, to be exercised in the mode prescribed by law, and its exercise, when in good faith and within the limits of its corporate powers, is only reviewable by the court in the case of an application by an occupant or owner of lands, feeling

aggrieved by the proposed location of the road. This right to locate its line of road, at its election, is delegated to the corporation by the sovereign power; as is the right substantially to acquire, *in invitum*, the right of way from the land-owner and any land needed for the operation of its road. In this sovereign power is the source of the franchise, which the corporation possesses, to construct and operate a railroad, and its grant is for public and not for private purposes. Public considerations enter into the grant of the franchise, and public policy favors the enterprise for the public convenience and use. When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land-owner or occupant, in our judgment it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects, and without violating the obvious intention of the legislature. The plaintiff's franchises were invaded and its enjoyment of the statutory privileges disturbed by the action of the defendant company, in so building tracks upon plaintiff's line of route as to obstruct and interfere with its proposed construction. The remedy by injunction was clearly available to the plaintiff on principles of equity jurisprudence. Story, Eq. Jur. § 927; Osborn *v.* Bank of U. S., 32 U. S. 9 Wheat. 740; bk. 6 L. ed. 204; Croton Turnpike Co. *v.* Ryder, 1 Johns. Ch. 611; Titusville & P. C. R. Co. *v.* Warren & V. R. Co. 12 Phila. 642; *Contra*, Costa C. M. R. Co. *v.* Moss, 23 Cal. 323; Boston & L. R. Corp. *v.* Salem & L. R. Co., 2 Gray, 27.

Same—Remedy by injunction.

The able opinion at general term, delivered by Barker, J., renders further consideration of the points in this case unnecessary.

The order of the general term appealed from should be affirmed, with costs.

All concur.

Railroad Crossing—Injunction.—See, *ante*, Humeston & S. R. Co. *v.* Chicago, St. P. & K. C. R. Co., 263, and note, 266, 267.

BALTIMORE AND OHIO R. CO.

v.

WALKER.

(*Ohio Supreme Court, March* 13, 1888.)

Crossings—Lessee—Owner of Track.—A railroad company which has the possession and control of a railroad in this State, and is managing and operating the same as the lessee thereof, is one "owning the track" of such railroad within the meaning of section 3333, Ohio Rev. St. which provides that "when the tracks of two railroads cross each other, or in any way connect at a common grade, the crossing shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks."

Same—Repairs—Watchmen—Expense.—The necessity for keeping the crossing in repair, and maintaining watchmen thereat, grows out of the use and operation of the railroads crossing each other at a common grade, and the benefits thereof accrue to the companies using and operating the roads; and, as such lessee company, while operating its road, receives the benefit and security resulting from a safe crossing and the services of the watchman, it takes them subject to the burden of their expense, as provided by the statute.

Same—Contribution—Common Obligation.—Where two or more are under a joint obligation to perform some lawful duty involving the expenditure of money, and one of them performs the whole duty, and discharges the obligation, he is entitled to have contribution from the others equally bound with him; and this is so whether the obligation arises from contract, or operation of law. The right depends upon equitable principles rather than upon contracts, but from the equitable obligation the law implies a contract to equalize the common burden; and if there is no circumstance rendering the equities otherwise than equal, and no express agreement, the contribution shall be so made that the common burden shall be borne equally by all bound by the common obligation.

Same—Joint Obligation—Apportionment of Expense.—The statute (section 3333, Ohio Rev. St.) imposes upon railroad companies the tracks of whose roads cross each other at a common grade, the joint duty and obligation of making, and keeping in repair, the crossing, and maintaining watchmen thereat, and requires the expense thereof to be borne by the companies jointly. The burden is common to both companies, and where either performs the whole duty, and pays the whole expense, it is entitled to recover from the other its equal proportion thereof.

ERROR to Circuit Court, Knox County.

On the 2d day of January, 1882, Goshorn A. Jones, receiver of the Cleveland, Mt. Vernon & Delaware R. Co., filed his petition in the court of common pleas of Knox county, against the Baltimore & Ohio R. Co., alleging "that the said Cleveland,

Mt. Vernon & Delaware R. Co. is a corporation created and organized under the laws of the State of Ohio, and under said corporate name, built, constructed, and operated a line of road extending from Hudson to Columbus, Ohio, by the way of Akron and Mt. Vernon, Ohio, and have conducted and operated said railroad, under said corporate name, from about the 1st of July, 1873, up to the 1st day of December, A.D. 1881; that on or about the 27th day of September, 1880, the said Goshorn A. Jones was, by the judge of the court of common pleas within and for the county of Summit, Ohio, in a certain proceeding therein pending against said Cleveland, Mt. Vernon & Delaware R. Co., appointed receiver of said railroad company, which position he accepted by executing a bond to the acceptance of said court, and entered upon the discharge of his duties as receiver; that he is still acting in the said capacity. The said plaintiff says that the said defendant, the Baltimore and Ohio R. Co., is a foreign corporation, created and organized under the laws of the State of Maryland, and is now, and was on the 1st day of July, A.D. 1873, the lessee of the Sandusky, Mansfield & Newark R. Co., a corporation created and organized under the laws of the State of Ohio, and as such lessee the said defendant manages, controls, and operates the line and track of said Sandusky, Mansfield & Newark R. Co., from the city of Sandusky to the city of Newark, in said State of Ohio, and through the county of Knox and a portion of the city of Mt. Vernon; and the said defendant, the Baltimore & Ohio R. Co., runs its passenger and freight trains, locomotive engines, and cars, and machinery over and upon said track and line of road. The said plaintiff says that the railroad track of said Cleveland, Mt. Vernon & Delaware R. Co., and the railroad track of the Baltimore & Ohio R. Co. on the Lake Erie division, a short distance southwest of Mt. Vernon, Ohio, cross each other at a common grade; that the crossing at said point was made and constructed by the said Cleveland, Mt. Vernon & Delaware R. Co. about the 1st day of July A.D. 1873; that all the material used, and labor performed, in constructing said crossing, including the materials used and labor performed in building the watchman's house, were all furnished, supplied, and paid for by the said Cleveland, Mt. Vernon & Delaware R. Co.; that said crossing and house for a watchman was done, and constructed for the common interest, benefit, and necessity of the Cleveland, Mt. Vernon & Delaware R. Co., and the defendant, the Baltimore & Ohio R. Co. The plaintiff says that from the 1st day of October, 1873, the said Cleveland, Mt. Vernon & Delaware R. Co. have kept, maintained, and paid the salary of a competent watchman, who performed all the necessary work, labor, and services required by the laws of Ohio; that the services of said

watchman were for the mutual benefit of the said plaintiff and the said defendant, as such watchman was and is required by the laws of Ohio to be kept and maintained at railroad crossings. The said plaintiff says that the amount of expenditure necessary to be made for the construction, and repairs, and maintenance of said railroad crossing, with the amount paid the watchman, and erection of the watchman's house, from said 1st day of October, 1873, to the 1st day of December, A.D. 1881, amounts, with interest, to the sum of $5789.05. An itemized statement of said account of expenditures is hereto attached, marked "Exhibit A," and made a part of this petition. The said plaintiff further says that said defendant became and was liable to bear and pay one half of said expense, and the said defendant is now indebted to the said plaintiff in the sum of $2894.52,—the one half of the said sum of $5789.05, the amount paid out and expended by the said plaintiff as aforesaid, with interest included. The plaintiff has frequently requested and demanded of the said defendant payment of the said sum due the plaintiff, which the said defendant has refused to pay, or any part thereof. There is now due from said defendant to said plaintiff the said sum of $2894.52, for which sum of $2894.52 the plaintiff prays judgment against said defendant, with interest, from the 1st day of December, 1881. The itemized account attached to the petition as Exhibit A commences July 1, 1873, and ends with December 15, 1881. The first item is for crossing-frogs;" and the next, dated October 1, 1873, is for "material furnished and labor performed in building the watchman's house." Then follows regular monthly charges for amounts paid the watchman, and regular annual charges for amounts paid for signal supplies, with interest on each charge to December 1, 1881. The defendant demurred "to all the items in said account which accrued prior to January 2, 1876," on the ground that they were barred by the statute of limitation, more than six years having elapsed from their date before the commencement of the action. The demurrer was sustained by the court, and the defendant then answered as follows: "Answering to so much only of plaintiff's petition and pretended claim against this defendant as remained after the sustaining of the court of the demurrer of the defendant, filed heretofore in this case, to certain parts and items of said petition, as more fully appears of record, it denies that defendant became and was liable to bear and pay any part of said expense of putting in said crossing and watchman's house, and maintaining the same, or any part of the expense of maintaining a watchman at said crossing, and denies that defendant is now or ever was indebted to said plaintiff, or to said Cleveland, Mt. Vernon & Delaware R. Co., by reason of the putting in and maintaining said crossing, watchman's house, and maintaining

said watchman at said crossing, in any sum whatsoever. For defendant avers that, at the time of putting in said crossing, and building said watchman's house, as averred and stated in said petition, the said Cleveland, Mt. Vernon & Delaware R. Co., for a valuable consideration then and there received by the said Cleveland, Mt. Vernon & Delaware R. Co. from and by this defendant, then and there paid and delivered to said Cleveland, Mt. Vernon & Delaware R. Co., agreed and contracted with this defendant to put in said crossing, and furnish all material therefor, and furnish all material, and build said watchman's house, and forever keep and maintain said crossing and said watchman's house, and forever to keep and maintain a watchman at said crossing all at the expense and costs of said Cleveland, Mt. Vernon & Delaware R. Co.; and this defendant to pay or bear no part of the expense of constructing said crossing or watchman's house, and no part of maintaining or keeping the same in repair, and to pay no part of the expense of maintaining said watchman at any time. And defendant avers that, in pursuance of said arrangement and contract, the said Cleveland, Mt. Vernon & Delaware R. Co. did, at the time mentioned in said petition, put in said crossing, and build said watchman's house, and has ever since maintained the same, and has ever since maintained and employed a watchman at said crossing, all at the proper expense of said Cleveland, Mt. Vernon & Delaware R. Co.; which last-mentioned company has never claimed, pretended, or intimated, until within a very short time prior to the commencement of this suit, that said defendant should be chargeable with any part of said expense." The answer contains a second defence pleading the statute of limitation to such items as accrued less than six and more than four years before the action was commenced. This of course was no defence, was not relied upon, and need not be further noticed. The reply admits "that plaintiff furnished all the material put in said crossing, erected the watchman's house, and has ever since maintained the same, and paid the watchman; and the plaintiff denies each and every statement and allegation in said answer contained not expressly admitted and set out in the petition."

It appears from the record that, while the action was pending in the court of common pleas, Jones ceased to be receiver, and that George D. Walker, who had been appointed his successor, was, by consent of the parties, and the order of the court, substituted as party plaintiff; and thereupon the cause was submitted to the court, and judgment rendered for the plaintiff. The motion of the defendant for a new trial was overruled, and a bill of exceptions was duly taken, which states that "the said cause was submitted to the court on the pleadings alone, and no testimony was offered by either party to sustain the issues made

by the pleadings herein;" and that the court "rendered judgment against the defendant, and in favor of the plaintiff, on the pleadings." The defendant prosecuted error to the circuit court, where the judgment was affirmed, and then filed his petition in error in this court to reverse those judgments.

Cooper & Moore and *J. H. Collins* for plaintiff in error.

H. H. Greer for defendant in error.

WILLIAMS, J.—The case was submitted to the court of common pleas upon the pleadings, and some questions are raised here as to their effect, which will be noticed before considering the more important questions in the case. It is first claimed that it was error to render judgment for the plaintiff without proof of the value of the items of the account attached to the petition, because the allegations of their value were not admitted by the failure to controvert by answer. The petition, however, does not seek to recover the value of the services of the watchman, or of the signal supplies, but the amounts paid and expended by the plaintiff therefor. There are no allegations of value in the petition to be controverted by answer, or considered as controverted by failure to answer; and, if there were, the court might in its discretion render judgment without proof. It has been held by this court that where judgment is rendered in default for answer in such case, without requiring proof, there is no error for which the judgment will be reversed. Dallas *v.* Ferneau, 25 Ohio St. 635. And the reasons for so holding apply with equal force to cases where the defendant answers, leaving unchallenged the items of the account, and defends upon another and distinct ground,—such as payment, or, as in this case, that the defendant, by agreement between the parties, was exonerated from the payment; and consents to the submission of the case without questioning the correctness of any item in the account. Again, it is claimed by the plaintiff in error that the answer puts in issue the averments of the petition, because it denies "that the defendant became liable to bear any part of the expense of putting in the crossing and watchman's house, and maintaining the same, or any part of the expense of maintaining the watchman at the crossing;" and also denies "that the defendant is now or ever was indebted to the plaintiff, or to the Cleveland, Mt. Vernon & Delaware R. Co., by reason of the putting in and maintaining said crossing, watchman's house, and watchman at said crossing, in any sum whatever." The denials are mere conclusions of law on denials of such conclusions. Rolling Stock Co. *v.* Railroad, 34 Ohio St 467; Larimore *v.* Wells, 29 Ohio St. 13; Bank *v.* Lloyd, 18 Ohio St. 553. Besides, they are to be regarded as conclusions

Necessity of proof of value of items of account—Allegations in petition.

of the pleader from the statement of facts accompanying them, and which constitutes the real defence. It will be noticed that the defendant denies the liability and indebtedness to the plaintiff, for it avers that the Cleveland, Mt. Vernon & Delaware R. Co. agreed with the defendant, for a valuable consideration paid it by the defendant, to put in the crossing, build the watchman's house, and forever keep the same in repair, and maintain the watchman at the crossing, at its own expense, and without cost or expense to the defendant, and that it was in pursuance of this agreement the expenditure mentioned in the petition was made. Looking to the whole answer, its proper construction and effect is that, because of the facts so stated, it is not liable or indebted upon the cause of action set up in the petition. No material allegation of fact in the petition is controverted by the answer, but the liability and indebtedness therein charged against the defendant are sought to be avoided on the ground that the plaintiff had already been compensated therefor under the agreement referred to. This is an affirmative defence, which, if not controverted by reply, should be taken as true, and, either so admitted or established by proof, would constitute a complete bar to the action. The effect of the reply denying the allegations of the answer, therefore, was to put the defendant upon proof of the agreement alleged; and as no evidence was given on the trial of the action, but the case was submitted upon the pleadings, the answer availed the defendant nothing, leaving the petition of the plaintiff uncontroverted. Practically, therefore, the case was submitted to the court as upon default or demurrer to the petition.

Adopting this view of the pleadings, the plaintiff in error contends that judgment should not have been rendered against it upon the case made in the petition, (1) because it appears that the Baltimore & Ohio R. Co. was not the owner of the railroad crossed by the Cleveland, Mt. Vernon & Delaware Railroad, but was a lessee thereof only; (2) it does not appear that the defendant either requested the plaintiff, or the company of whose road he is receiver, to incur the expenditure, or promised to pay its proportion of such expenses; (3) it is conceded by the plaintiff that his right to maintain the action depends largely, if not solely, upon section 3333, Rev. St., and the construction to be given to it. It reads as follows: "Sec. 3333. When the tracks of two railroads cross each other, or in any way connect, at a common grade, the crossing shall be made, and kept in repair, and a watchman maintained thereat, at the joint expense of the companies owning the track. All trains or engines passing over such track shall come to a full stop not nearer than two hundred feet, nor further than eight hundred feet, from the

Contentions of plaintiff in error.

Statutory provisions.

crossing, and shall not cross until signalled so to do by the watchman, nor until the way is clear. And, when two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence if the tracks are both main tracks, over which all passengers and freights on the roads are transported; but if only one track is such main track, and the other is a side or depot track, the train on the main track shall take precedence; and if one of the trains is a passenger train, and the other a freight train, the former shall take precedence; and regular trains on time shall take precedence over trains of the same grade not on time; and engines with cars attached, not on time, shall take precedence of engines without cars attached, not on time."

In the argument it is contended the ownership of the Cleveland, Mt. Vernon & Delaware Railroad is not properly stated in the petition. But this sufficiently appears, for it avers that the corporation was created and organized under that name, and that it built the road, and operated it until the receiver was appointed in 1880. This point is not much relied on by the counsel for plaintiff in error. The real contention is that the statute applies only to railroad companies owning the tracks which cross each other, or connect at a common grade, and companies operating roads are not owners or lessees. The terms "owner" and "owning" depend somewhat for their signification upon the connection in which they are used. "To own" is defined, "to hold as property; to have a legal or rightful title to; to have; to possess." And an owner is "one who owns; a rightful proprietor." An owner is not necessarily one owning the fee-simple, or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and, indeed, there may be different estates in the same property, vested in different persons, and each be an owner thereof. In the construction of statutes, to ascertain the proper meaning of such terms regard must be had to their various provisions, and such effect given as these provisions clearly indicate they were intended to have, and as will render the statute operative. Thus under the mechanic's lien statute of March 11, 1843 (41 Ohio Laws, 66), which provided "that any person who shall perform labor or furnish material for constructing or repairing any building, by virtue of a contract or agreement with the owner, shall have a lien upon such building and the lot of land upon which the same shall stand," it was held that the word "owner" is not limited in its meaning to an owner of the fee, but includes also an owner of a leasehold estate. Choteau *v.* Thompson, 2 Ohio St. 114; Dutro *v.* Wilson, 4 Ohio St. 102. In Gilligan *v.* Board, etc., 11 R. I. 258, it is held that "a tenant for life or years, or from year

Lessee is one "owning the track."

to year, is an owner," within the provisions of the statute which gave "compensation to abuttingowners, for damages caused by a change of grade in highway." And under a statute which provides that "when any passenger shall die from any injury resulting from, or occasioned by, any defect or insufficiency in any railroad, or part thereof, or in any locomotive or car, the corporation which owns any such railroad, locomotive, or car at the time such injury is received resulting from, or occasioned by, any defect or deficiency above declared, shall forfeit and pay for every passenger so dying the sum of five thousand dollars," the supreme court of Missouri held that the word "owner" in the act did not mean "the absolute owner, in whom the absolute right of property is invested," but means "the owner for the time being, the corporation for the time being operating, controlling, and managing the road, locomotive, or car." The provisions of section 3333, as well as those of the next two sections, were intended to prevent collisions of trains, and injuries, and similar calamities, at railroad crossings, often destructive of human life, besides inflicting heavy losses on companies operating the road; and they are well calculated for that purpose. They properly require all trains and engines passing on the tracks of either road to come to a full stop before crossing, and not to cross until signalled by the watchman, and fix the order of precedence among trains and engines at the crossings. The managing agent and superintendent are required to publish to the employees such rules and regulations as shall secure strict compliance with the provisions of the statute, and engineers and others in charge of engines who fail to bring them to a stop, or cross before being signalled to do so by the watchman, are subject to penalties, and they, as well as the companies employing them, are made liable for the damages resulting from such neglect. These, or some such regulations, are indispensable to the actual operation of the roads. They are necessary for the safety of passengers and property transported over those roads, and none the less so to their convenient and successful management by the companies engaged in operating them, and to the protection of their property and employees. The services of the watchman consist in giving the proper signals to approaching trains and engines, and to enable him adequately to perform these services it becomes necessary to build and maintain the watchman's house. His services pertain wholly to the actual operation of the roads, and result entirely to the benefit of the companies operating them. The necessity for keeping the crossings in repair, and maintaining watchmen thereat, grows out of the use and operation of the railroads whose tracks cross each other at a common grade, and lessee companies having the

Lessee takes benefits subject to burden of expense.

possession and control of the roads, and operating them as such, receive all the advantages and security resulting from safe crossing and the services of the watchman as fully in all respects as companies that are the absolute owners thereof could if they were operating them; and it would appear but reasonable that, while operating the road, they should receive the benefit subject to the burden of their expense, as provided by the statute; and we are of the opinion that such lessees are companies "owning the tracks" of the roads operated by them, in the sense in which that phrase is used in the statute.

Doctrine of contribution—Common obligation.

It is further contended that the petition fails to state a right of action against the defendant because it does not show the defendant requested the expenditure for a portion of which it was sued, or that it promised to pay any part of it. The statute, it is claimed, does not authorize one company to make all the expenditure rendered necessary to comply with its provisions, and sue the other for half or any part of same. And there being no express agreement alleged, nor any request from the defendant, or subsequent promise or ratification by it, from which one might be implied by law, the case, it is urged, falls within that class of voluntary outlay of money which gives no right of action. Generally where one person voluntarily pays money for another, under such circumstances that the other is not at liberty to accept or reject the advantage of it, but is obliged to accept it, his acceptance of what he was not at liberty to reject is no evidence of ratification or adaption, and raises no implicit promise to pay. This rule has been applied to tenants in common, where repairs or improvements of the common property have been made by one tenant without the consent of the other; and it is insisted the railroads in question were tenants in common, and to be governed by that rule. In the cases where the rule stated is enforced, it will be found that it was entirely optional with the tenant making the expenditure whether he would incur it or not. He might or not as he chose. There was no duty resting upon him to do so, either by contract, or arising from his relation to the co-tenant. In other words, the expenditure was purely voluntary, and thus lays at the foundation of the rule. But we apprehend the rule is inapplicable to a case like this, where two are under a joint duty or obligation to expend money, and one, in the performance of the common duty, discharges the whole obligation. It cannot in such case be said the payment is wholly voluntary. The rule is as well established as the one already referred to that where two or more are under a joint obligation, and one discharges the whole, he shall have contribution from the others. Usually this obligation is created by contract, but it can make no difference in principle whether it be by contract or operation of

law, so long as the obligation is joint, and not unlawful. "The doctrine of constitution rests upon the broad principle of justice that where one has discharged a debt or obligation which others were equally bound with him to discharge, and thus removed a common burden, the others who have received a benefit ought in conscience to refund to him a ratable proportion. It depends rather upon principles of equity than upon contract. From the equitable obligation the law implies a contract, since all who have become jointly liable may reasonably be considered as mutually contracting among themselves with reference to the duty in conscience." 2 Wait, Act. & Def. 288, and cases cited. In Bish. Cont. § 238, it is said: "When a duty is cast upon one by statute, or by equity and good conscience (the standard whereof is to be found in the books of law rather than those on moral science), or in any way by the law whether statutory or common, or where one has been benefited by another who was discharging such duty, the law creates a promise from him to do the thing or pay the benefit." And again, in section 205, the same author says: "The law, by placing its command, in whatever form, upon one to do a thing for the benefit of another or the State, creates the promise from the latter to do it. As, for example, in the words of Blackstone, 'whatever the laws order any one to pay that becomes instantly a debt which he hath before contracted to discharge.' Thus, when a statute imposes upon one a duty, the law creates a promise from him to the party benefited thereby to perform it." The application is obvious. A joint duty is by statute imposed upon railroad companies whose roads cross at grades to keep such crossing in repair, and maintain watchmen thereat, at their joint expense. The obligation is equally binding upon both companies, and neither can with impunity omit the performance of the duty, or ignore the obligation. When, therefore, one performs the whole duty, and discharges the entire obligation resting upon both, it can with no propriety be said to be a mere voluntary act. One purpose of the statute undoubtedly was to promote the safety of people who travel over the roads, and the security of the property carried over them; and in this respect the duty of the companies under it is to the State and its citizens. But, while this may have been the principal object of the statute, it also fixes the legal rights of the companies as between themselves, and imposes duties upon each to the other. These rights and duties pertain to the use of the common crossing, and among the duties both to the State, and towards each other, are those of keeping the crossing in repair, and maintaining watchmen at their joint expense. Either may therefore lawfully do whatever is necessary to their performance. Applying the principle started by Bish. Cont. cited *supra*, the law's command created the joint promise of the companies to the State, and the

several promises of each to the other, to perform the duties perscribed by the statute. In this sense the obligation of the companies becomes one of contract; and one of them having discharged the whole obligation, and the other no part of it, though receiving the full benefit, there is no reason why it should not, upon the principle already stated, be entitled to reimbursement from the latter for its share of the common burden borne by the former. The case of Middleborough *v.* Taunton, 2 Cush. 406, relied on by counsel for plaintiff in error, is not inconsistent with this conclusion, but, as we understand the case, is in harmony with it. In that case it appeared that the town of Middleborough was indicted for neglecting to repair one of its highways. It confessed the indictment and was fined. The court appropriated the fine to the repair of the highway, and appointed an agent to superintend its application. The plaintiff alleged that the highway was upon the dividing line between it and the town of Taunton, and the duty of repairing the same was equally incumbent on both towns. The dispute in the case was whether there was a common obligation on both towns to repair the highway. The defendant contended the whole of it was within the town of Middleborough, or, if not, the centre of the highway was the dividing line, and each town was bound to keep in repair such highways only as were within their respective limits. The trial court ruled that the whole of the way was within Middleborough, and the plaintiff became nonsuited, subject to the opinion of the whole court. It does not appear to have been questioned that, if to both towns belonged the joint or common duty to repair the highway, the plaintiff should have recovered; but, since that was not the case, the judgment was affirmed. Shaw, C.J., in the opinion says: "But it is said that towns are by law (Rev. St. c. 25, § 1) obliged to repair highways, and it is certainly true that all highways 'within the bounds of any town' are to be kept in repair at the expense of such town. If towns repair beyond their bounds without an actual request, it is a voluntary act done in pursuance of no obligation or duty, and money laid out for such a purpose is not expended at the implied request of the town subject to the duty of such repairs. It seems to us, therefore, that the case of the plaintiffs falls within this dilemma. If the road was wholly in Middleborough, the plaintiffs have merely performed their own duty, and paid their own debt. If one half of it only was in Middleborough, the other was in another town and county, and the plaintiffs, if they have laid out money to repair it, have done so in pursuance of no actual request, or of any common duty or obligation constituting a request in law, and of course, that an action for money paid will not lie." It would seem to follow, from the reasoning of the learned chief

justice, that, if the money had been expended in the discharge of a common obligation belonging to both towns to repair the way, the action would have lain.

Joint obligation—Apportionment of expense.

The further claim is made by the plaintiff in error that, while the statute provides that the expense of keeping the crossing in repair and maintaining watchmen, shall be borne by the companies jointly, it is silent in regard to the proportion to be borne by each; and, as one company may require the watchman's services many times more than the other, the expenses should be apportioned accordingly. Whether in such case the expenses should be apportioned on the basis indicated, or, upon any state of facts, an unequal decision could under the statute be made we need not decide. Such circumstances of inequality of benefits are not shown, nor does any other reason appear making an equal division of the burden unjust. If any such existed, the defendant should have made it to appear. The correct rule on this subject is clearly stated in Bish. Cont. § 216, as follows: "When persons are under equal obligations to do a thing not violative of law, and one of them does it, if there is no circumstance rendering the equities between them otherwise than equal, and no express agreement, the doer is entitled, under a promise which the law creates, to recover such sums of his several companions as shall leave the burdens equal. This is the familiar rule between sureties and other joint promises, where one has discharged more than his proportion of the debt, and it applies also in other like cases."

We think the right of the plaintiff to recover upon the case made in his petition is sustained by sound reason, and sanctioned by authority, and the judgment recovered by him should be affirmed.

Doctrine of Contribution.—For a full discussion of this subject, see 4 Am. & Eng. Encyclo. of Law, p. 1, *tit.* CONTRIBUTION.

NEW YORK, CHICAGO AND ST. LOUIS R. CO.

v.

GRAND RAPIDS AND INDIANA R. CO.

(*Indiana Supreme Court, October* 12, 1888.)

Crossing—Contract—Breach.—An action by one railroad company against another, to recover damages for a collision at a railroad crossing, may be maintained under a contract by which it was agreed that the defendant company should maintain the crossing for the use of both parties; where it appears that the servants of the defendant failed to obey a signal, as required by a code established in pursuance of the contract, such failure being a breach of contract gives a clear right of action.

Same—Duty to Anticipate Breach.—Where an agreement regulating the use of a level crossing has been made between two railroad companies, the employees on a train having the right of way are not bound to anticipate any breach of the agreement on the part of the employees of the other railroad company.

Same—Evidence—Damages.—In an action to recover damages for injuries to a car by a collision at a railroad crossing, testimony as to the cost of taking up and repairing the car, and as to the difference in value of the car as it was after the injury, and as it was before it was injured is competent.

Same—Condition of Engineer.—In such action it may be shown that the defendant's engineer had been drinking intoxicating liquor.

APPEAL from Superior Court, Allen County.

Action to recover damages for injuries to a car caused by a collision at a railroad crossing. The defendant appeals from a judgment for the plaintiff.

The facts are stated in the opinion.

Bell & Morris for appellant.

A. A. Chapin and *W. S. O'Rourke* for appellee.

ELLIOTT, J.—The complaint of the appellee sets forth a written agreement in which, among other things, the appellant promised to put in, at the place where it was agreed that its road should cross that of the appellee, "a semaphore or such other signal or signals as may be now or hereafter prescribed by law, and supply and keep and maintain good, sufficient, and acceptable watchmen to take charge of and operate the same forever."

Facts—Averments in complaint.

It is averred that the contracting parties had agreed upon a

code of signals to be used at the crossing, and that it was the duty of the watchmen to operate the signal target and give the proper signals; that each of the parties had agreed to obey these signals; that the proper signal was given which gave the appellee the exclusive right to the crossing; that, while moving a train upon said crossing in obedience to the proper signal, the appellant's engineer drove the engine of which he was in charge against the appellee's cars; and that the injury to the appellee's property was caused by the appellant's reckless and wilful negligence.

The contract between the parties must be construed with reference to the surrounding circumstances and the object the parties intended to accomplish. Indiana, B. & W. R. Co. *v.* Adamson, 114 Ind. 282; s. c., 34 Am. & Eng. R. R. Cas. 137.

It is obvious that what the parties intended was that the appellant should secure a way across the track of the appellee, and should provide means of making and keeping the crossing safe for the use of both parties. Whatever was reasonably necessary to carry into execution this object was implied, and it was therefore entirely competent for the parties to give effect to the contract by establishing a code of signals. As they did establish such a code under the contract, and the appellant failed or refused to obey them, there was a breach of contract, and hence a clear right of action. This right of action came into existence the moment the contract was violated and loss resulted.

Contract between the parties—Breach.

It is not material whether the breach was reckless or not; if there was a breach, the appellant became a wrongdoer, and as such liable to an action.

Counsel for appellant argue that "there is no right of recovery on the contract, because there is nothing in it by which the appellant obligates itself to indemnify appellee against the acts of the targetman; no negligence is charged against the targetman; there is no agreement in it to pay for the negligence of appellant's employees in disobeying the targetman's signals." This argument is entirely destitute of strength. The law awards damages where there is a breach of contract or of duty. It is not essential that parties should incorporate the law in their contract.

The answers to the special interrogatories addressed to the jury do not overthrow the general verdict. We agree with appellant's counsel that if the appellee had been guilty of negligence contributing to the injury no action would lie. Gavett *v.* Manchester & L. R. Co., 16 Gray, 501; Kentucky Cent. R. Co. *v.* Dills, 4 Bush, 593.

Answers to interrogatories.

But, while acquiescing in counsels' views of the law, we dis-

sent from their construction of the answers to interrogatories. It may be true that the employees of the appellee could have seen appellant's locomotive in time to have stopped the appellee's train, but from this fact it cannot be inferred that they were negligent. They were obeying the rightful signal, and they were not bound to anticipate a disobedience by the appellant. On the contrary, until it appeared that there was a disregard of the signal, the employees of the appellee were not negligent in failing to anticipate a breach of duty on the part of the appellant.

Same—Duty to anticipate disobedience.

The general verdict embraces the whole issue, and necessarily decides all material questions in favor of the appellee; and that decision must stand, unless some one, at least, of the answers states a fact fatal to a recovery. It is essential that the facts shall be stated; for presumptions are made in favor of the general verdict, and not in favor of the answers to special interrogatories. Fort Wayne, C. & L. R. Co. *v.* Byerle, 8 West. Rep. 549, 110 Ind. 100; Rice *v.* Evansville, 6 West Rep. 242, 108 Ind 7; Redelsheimer *v.* Miller, 5 West. Rep. 619, 107 Ind. 485.

There is no fact stated in any of the answers of the jury that overthrows the general verdict.

There was no error in admitting in evidence the contract between the parties respecting the crossing.

The court did not err in permitting the witness O'Rourke to state the approximate cost of taking up and repairing the car injured by the collision. It was competent to prove by a qualified witness, as Sylvanus Bradley was, the difference in value between the car as it was after it was repaired and as it was before it was injured. A competent expert may give an opinion as to the distance at which it is safe to stop before going upon a crossing.

Evidence—Damages.

It was not error to permit the appellee to give evidence tending to show that appellant's engineer had been drinking intoxicating liquor.

We have examined the instructions given and refused, and we find no error in any of the rulings upon them.

We cannot disturb the verdict on the evidence. It is in truth well supported.

Judgment affirmed.

ZOLLARS, J., did not take any part in the decision of this case.

Collision of Railroad Crossings.—See, for general discussion of the topic of crossings, 4 Am. & Eng. Encyc. of L. 906, *tit.* "CROSSINGS."

Same—Duty of Engineer.—The duty of an engineer of a railway train is not fully performed by merely bringing his train to a stop at a stopping-board before reaching a railway crossing. It is his duty to observe the track he is about to cross, to ascertain whether there are any trains on it with which he would be liable to collide; and, even if he had the right of

way, yet if he saw that a train upon the other road had passed its stopping-board without stopping, or was approaching it at such a rate of speed as to indicate that it would not stop, and hence that there would be danger of a collision in case he proceeded, he would not be justified in doing so, if he could stop his train before reaching the crossing. Pratt *v.* Chicago, Milwaukee & St. Paul R. Co. (Minn.), 30 N. W. Rep. 356.

GULF, COLORADO AND SANTA FE R. CO.

v.

ROWLAND.

(*Texas Supreme Court, March* 20, 1888.)

Farm-crossings — Constitutionality of Statute — Compensations. — A statute which requires railroad companies to make, at their own expense, farm-crossings within enclosures, is unconstitutional in so far as it applies to companies which secured their right of way before its enactment, and which have compensated the owners of inclosures for lands taken and for the expense of constructing crossings, such expense being included in the compensation paid for the right of way.

APPEAL from District Court, Burleson County.

Action by J. C. Rowland against the Gulf, Colorado and Santa Fe R. Co., to recover a statutory penalty for failure to construct a farm-crossing within plaintiff's inclosure. A judgment was rendered for the plaintiff, from which the defendant appeals.

J. W. Terry for appellant.

Broaddus & Banks for appellee.

GAINES, J.—The decision of this case depends upon the determination of the question of the constitutionality of the act of March 23, 1887, which provides that all railroad companies which had theretofore or which may thereafter "fence their right of way may be required to make openings or crossings through their fence and over their road-bed, along their right of way, every one and a half miles thereof;" and, "if such fence shall divide any enclosure, that at least one opening shall be made in said fence within such enclosure." Laws 20th Leg. 39. Appellee was the owner of an inclosure, through which appellant had its road and fenced its right of way, and, having given notice to construct a crossing in his enclosure, and the company having failed to comply with his demand, brought

Provision of statute—Facts.

suit to recover the penalty provided by the statute, and recovered a judgment. The facts were admitted as alleged in the petition and answer. From the answer it appears that the company was incorporated by a special law of the legislature passed in 1873, and that, since the adoption of the constitution of 1876 and the Revised Statutes, its charter had been several times amended, in accordance with the provisions of the latter relating to the amendment of the charters of railroad corporations. It also appears that in 1880 appellee conveyed to appellant the right of way through his inclosure, by deed, without any reservations or conditions whatever, and that in the same year appellant constructed its road and fenced it as required by the laws then existing.

Under the law which existed at the time the right of way was conveyed, it was the duty of the railroad company to fence its track; and it becomes unimportant to inquire what were the rights of the parties with respect to crossings over the railroad track in the inclosures after the conveyances were executed and before the passage of the law in question. Our previous statutes contain no provision in reference to what is now commonly known as "farm-crossings," and we must resort to the general principles of the common law in order to determine the question. In the first place, we are of opinion that the owner of inclosed land, who has granted the right of way to a railway company by deed, must be held entitled to such crossings over the railroad track as are reasonably necessary for the use of the premises enclosed. It is elementary law that a vendor who conveys to another, land which is surrounded by the vendor's other land, impliedly grants a right of way over the land which is not conveyed (Washb. Easem. 233); and it is held that "the same rule applies when the grantor conveys land surrounding a parcel retained by him" (Brigham *v.* Smith, 4 Gray, 297; Seymour *v.* Lewis, 13 N. J. Eq. 444). This is upon the doctrine that the grantor impliedly reserves a way of necessity over the premises conveyed; and the principle applies with equal force to the owner of a farm who grants a right of way, through his inclosure, to a railroad company, or from whom the right of way is legally condemned for such a purpose. From the very nature of the transaction, it is not to be presumed that the owner, in the first case, intended by his grant to cut off access from one part of his inclosure to another; or, in the second, that the legislature, in authorizing the condemnation, intended to bring about such a result. Railroad Co. *v.* Bost, 2 Will. § 386. In case either of a grant or a condemnation, it is the right of the owner of the land to demand crossings; but, in the absence of some stipulation in the contract or of some proposition in the condemna-

Common law principles as to farm crossings—Authorities.

tion proceedings, we do not think it the duty of the railroad company to put them in at its own expense. It is generally held, and especially by the more recent authorities, that, in the absence of a statute making it the duty of the corporation to provide farm-crossings, the expense of constructing and maintaining them is to be allowed the owner as a part of the damages for condemning the right of way. Railroad Co. *v.* Gough, 29 Kan. 94; s. c., 10 Am. & Eng. R. R. Cas. 151; Railroad Co. *v.* Kregelo, 32 Kan. Co., 608; s. c., 20 Am. & Eng. Corp. Cas. 241, Chalcraft *v.* Railroad 113 Ill. 86. Judge Redfield, in his work on Railways, written before the decisions in the cases cited, says: "And the tendency of the more recent decisions is sensibly in this direction; and we might add, without offence, that in our judgment, it is the only sensible direction the decisions could take, and we have always expected them to take such direction in the end, however late it may come." 1 Redf. R. R. 510. See also Railroad Co. *v.* Moffatt, 6 Cal. 74; 3 Suth. Dam. 444, 445. Such is also the ruling of our court of appeals in the case of Railroad Co. *v.* Bost, above cited; and it is to be remarked that the element of damages in condemnation proceedings by railroad companies is a matter peculiarly within the cognizance of that tribunal. The decision of this court in Railway Co. *v.* Pape, 62 Tex. 313, is in accord with the principles announced in the cases cited. These rulings are evidently founded upon the doctrine that, in the absence of a statutory provision upon the subject, the law gives a right to the owner of the farm to have crossings, but imposes upon him the expense of their construction and maintenance; and we think it clear that one who grants a right of way by an absolute deed, without any stipulation in this regard, has precisely the same rights against his grantee as if his land had been legally condemned, and no more. It must therefore be presumed that, when he made the deed, he received compensation for the prospective expense of making and keeping in repair the necessary crossings over the track of the railway, and the inconvenience resulting to him from the construction and operation of the railroad. It follows, from the principles announced, that, there being no law requiring railroad companies to make farm-crossings at the time appellee executed his deed, the company is presumed to have indemnified him for the expense of constructing and keeping in repair all necessary crossings within his inclosures.

Same—Expense of constructing crossings.

We come, then, to the question of the power of the legislature to require of the railroad companies to put in crossings at their own expense after having compensated the owner for the burden imposed upon them by the necessity of such construction. It is claimed that the statute under consideration was

but a lawful exercise of the police power of the legislature to require railroad corporations to fence their track, has been universally upheld, and has been expressly affirmed by this court. Railway Co. *v.* Childress, 64 Tex. 346, and cases there cited; Humes *v.* Railway Co., 82 Mo. 221; Hines *v.* Railway Co., 86 Mo. 629; Wilder *v.* Railroad Co., 65 Me. 332; Quackenbush *v.* Railroad Co., 62 Wis. 411; Railway Co. *v.* Mower, 16 Kan. 573; Sawyer *v.* Railroad Co., 105 Mass. 196, and cases cited in Tied. Lim. Police Power, 597, note 1. In speaking of our statute on this subject, this court, in the case above cited from our Reports, says: "The object of the statute was to compel them (the railroad companies) to fence their tracks for the purpose of preventing damage to live-stock, and for the still more important purpose of protecting the lives and limbs of passengers upon their trains." Laws made for such purposes are clearly within the scope of the police power or authority which it is held the legislature has no right, by charter or otherwise, to give or bargain away. Regulations imposed upon railroad corporations requiring the ringing of bells, the blowing of whistles, the constructing of crossings at the intersection of public highways, and the maintenance of cattle-guards, having in view similar objects, have been uniformly sustained as a proper exercise of a power impliedly reserved in granting the corporate franchises, and hence not in conflict with that provision of the constitution of the United States which prohibits the States from making any law impairing the obligation of contracts. But a statute making it the duty of a railroad company, which has already fenced its track in obedience to previous laws, to construct crossings within the inclosures, apparently for the sole benefit and convenience of the owners of such inclosures, seems to us to present a different question. We have found but one case which holds that such a regulation comes within the limits of the police power (Railroad Co. *v.* Willenborg, 117 Ill. 203); but in the view we take of the case before us, it is not necessary, in reaching our conclusion, either to affirm or deny the correctness of that opinion. In the case cited the owner of the land had stipulated, in his conveyance of the right of way, that the railroad company should construct the necessary farm crossings, so that the specific constitutional question which is presented here did not there arise.

Power to compel railroads to put in crossings at their own expense.

That question now recurs: Can the legislature, after the company has compensated the owner of an inclosure for the expense of constructing his own crossings, shift the burden, and require the company to put them in at its own charge? In our opinion, this question must be answered in the negative. Appellant's charter, although

Same—Effect of company compensating owner—Authorities.

granted by a special act of the legislature in 1873, has been amended under the provisions of article 4109 of the Revised Statutes, and it may be considered that by accepting such amendment it has been subjected, as to the privileges and franchises therein granted, to the control of the legislature. Const. 1876, art. 10, § 8; Id. art. 1, § 17. But the right of the legislature to amend the charter of a corporation cannot be construed as placing them beyond the pale of those constitutional provisions which guard the rights and property of natural persons from the encroachments of the legislative power. It is said by Chief Justice Shaw in the case of Com. *v.* Essex Co., 13 Gray, 253: "The rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." This was said in a case involving the rights of a corporation under a charter which was "subject to amendment, alteration, or repeal at the pleasure of the legislature." In the cases before us appellant has a conveyance of its right of way from appellee, for which it has paid a valuable consideration, and, according to the implied terms of the agreement, appellant was discharged of the obligation to construct or pay for appellee's crossings. Can it be said that an act which imposes this duty upon appellant does not impair the obligation of this contract? We cannot say it is the taking or damaging of property for a public use without compensation, because it seems to us the purpose for which the corporation is to be subjected to this expense is essentially private. But in so far as it takes from appellant the money required to construct these crossings, and appropriates it to the benefit of appellee, it is a taking of money (which is property) without due process of law, and is therefore unconstitutional. It was said in Hepburn's Case, 3 Bland, 98: "The government of this republic, by virtue of that eminent domain which for public purposes is intrusted to all governments, may take the property of any individual, and cause it to be applied to the use of the public on making him a reasonable compensation. But it cannot entirely take the property of one citizen, and bestow it upon another; because such an act, though not specially prohibited by the constitution, would be contrary to the fundamental principles of government itself." See also Crenshaw *v.* Slate River Co., 6 Rand. 245; *In re* Albany St., 11 Wend. 149; Bloodgood *v.* Railroad Co., 18 Wend. 59. In the case last cited (Com. *v.* Essex Co.) the corporation had been granted a charter by the Massachusetts legislature to construct a dam across the Merrimac river, and had been required to put in suitable fishways, as required by commissioners, and also to indemnify the owners of

fishing rights for all damages to the fisheries accruing from the construction of the dam. The fishway was put in, and the damages were paid. Subsequently the legislature passed an act requiring a different fishway. It was held that the act was unconstitutional and void. This decision was made upon the ground that the parties interested in the fishery rights had been compensated for the damages resulting from the imperfect fishway, as is shown by the subsequent case, in the same court, of Commissioners *v.* Water-Power Co., 104 Mass. 446. The facts of the latter were very similar to those in the former case. The distinctive difference was that in the latter it was shown that the fisheries below the dam had been damaged by its construction, and there had been no compensation to the owners below for the damages. By reason of this fact the court held that the act of the legislature requiring the company to put in an improved fishway was a proper exercise of the police power to protect public rights, which had not been distinguished by compensation, as in the Essex Co. case. It is clear from the opinion that if the water-power company had been compelled to pay, and had paid, damages to owners of the fisheries below as well as to those above its dam, the court would have held, in the latter case as in the former, that the legislature could not impose upon the corporation the expense of a costly work in order to restore to parties fisheries for the loss of which they had been directly paid. The same principle is involved in this case, and is decisive of it. There are many cases in which a similar doctrine has been maintained, but we merely cite here City of Erie *v.* Canal Co., 59 Pa. St. 174; Attorney-general *v.* Turnpike Road, 55 Pa. St. 466; State *v.* Railway Co., 31 N. W. Rep. 365; Com. *v.* Bridge, 2 Gray, 339; Bridge Co. *v.* State, 18 Conn. 53; Lake View *v.* Cemetery Co., 70 Ill. 191; Railway Co. *v.* Bloomington, 76 Ill. 447; People *v.* Plank-Road Co., 9 Mich. 284; Towle *v.* Railroad, 18 N. H. 547.

Same—Thorpe v. Railroad.

The main case relied upon by the appellee, in order to sustain the constitutionality of the act in question, is Thorpe *v.* Railroad Co., 27 Vt. 140. That case maintained the validity of an act of the legislature requiring railroad companies to put in cattle-guards at farm-crossings. It seems to us that requirements for fence and cattle-guards stand upon the same principle. They are necessary for the protection of such domestic animals as are likely to stray upon the track, and more especially for the safety of passengers and employees of the railroad companies. Farm-crossings are for the sole convenience of the owners of the land, and stand upon a different ground. Besides, it does not appear in that case that the owner of the farm had been in any manner compensated for the expense of constructing his own crossings or cattle-guards. That

decision, though it extends, as we think, the doctrine of the police power to its extreme limits, is not in conflict with the views expressed in this opinion.

We think it would have been competent for the legislature, in providing for fences, to have required the companies to put in farm-crossings, as a regulation of its undoubted power to require such fences. All subsequent rights of way would be presumed to have been acquired with reference to that law, and the land-owner would not have been presumed to have assumed the burden of their construction. We therefore think that, as in all subsequent acquisition of rights of way, in the absence of some express or implied agreement to the contrary, the railroad companies will be charged with the duty imposed by the statute, and the measure of the compensation will be regulated accordingly: therefore, as to such future cases, in our opinion, the statute should be constitutional in so far as it applies to crossings without enclosures. Smith *v.* Railroad Co., 63 N. Y. 58.

For the reasons given in the opinion, we think so much of the statute under consideration as requires railroad corporations to construct farm-crossings at their own expense, where the right of way has been acquired by deed, and the land fenced before the passage of the law, is in conflict with the constitution; and therefore the judgment will be reversed, and here rendered for appellant.

Farm-crossings.—See, *post*, Canada Southern R. Co. *v.* Clouse, 296, and note, 310; Canada Southern R. Co. *v.* Ermin, 311, and note, 314; Wells *v.* Northern R. Co., 314, and note, 317. For a full discussion of the questions of "crossing" in general, see 4 Am. & Eng. Encyc. of L. 609, tit. "CROSSINGS;" also, to "private crossings," Ib., subd. 9, p. 614.

GULF, COLORADO AND SANTA FE R. CO.

v.

ELLIS.

(*Texas Supreme Court, March* 20, 1888.)

Crossings—Constitutionality of Statute—Public Benefit.—Texas statute of March 23, 1887, which requires railroad companies to make, at their own expenses, crossings outside of any inclosure, on the demand of any two citizens "who either live or own lands within five miles of the place" designated for the crossing, is unconstitutional by reason that it is not necessarily for a public benefit, such citizens being authorized to require the establishment of a crossing, although actuated by selfish or malicious mo-

tives, and notwithstanding the fact that such crossing has no connection with any other way over which the public has a right to pass.

APPEAL from District Court, Burleson County.

Action by Tobe Ellis against the Gulf, Colorado & Santa Fe R. Co., to recover the statutory penalty for failure to construct a crossing, as required by statute.

The defendant appeals from a judgment for the plaintiff.

J. W. Terry for appellant.

Broaddus & Banks for appellee.

GAINES, J.—This suit involves mainly the same questions presented in that of Gulf, Colorado & Santa Fe R. Co. *v.* Rowland, *ante*, ——, this day decided. The counsel are the same in the two cases; and, recognizing the fact that many of the same points are presented by the two appeals, they have submitted them together. The facts were admitted, and are substantially alike in both cases, with this exception: that in the former the crossing was demanded in Rowland's inclosure, and in the present case the demand was for a crossing on appellee's land at a point outside of any inclosure. Rowland case.

We are of opinion that the principles laid down in the opinion in the former case apply to the case before us. We there determined that the owner of inclosed land, who grants to a railway company a right of way through his inclosure, reserves a right to such ways over the track as are reasonably necessary to the use of his property; but that, if his conveyance is absolute, in the absence of an existing statute making it the duty of the company to construct the crossings, he must put them in at his own expense. The right to a way over the railroad track grows out of the necessity of the case; and in many instances this necessity is as great in case of uninclosed lands as when they are fenced and used for farming or other purposes. For example, the railroad may intervene between the owner's residence and his farm, or between his residence and the public highway; or, the portion of the land lying beyond the railroad from his residence or farm may be that from which he draws his supply of wood for fuel and other purposes. But in this case, as in the other, when he conveys the right of way without a stipulation that the company shall constuct his crossings, he is held to have reserved his right to pass over the road, burdened with the charge of making the necessary structures at his own expense. It follows, therefore, that the grantors of a right of way to a railroad company, through unenclosed land, occupy precisely the same relations of property and contract to the company as those who convey such right of way through their inclosures; and that, for the reasons given in the Rowland case, the act in question must be held unconstitutional Rowland case followed.

as applied to the present case, unless it be decided that appellee, as the owner of land within five miles of the point designated as a crossing, outside of an inclosure, has some right superior to that of one who seeks a crossing within his own inclosure.

If any two citizens "who either live or own lands within five miles of the place" where a crossing may be demanded, may require a crossing outside of an inclosure, than we apprehend that the mere fact that appellee owns the land, and has granted the right of way, would not debar him of the right to make the demand. The statute seems to have two objects: one to benefit the owner of inclosed land, and the other to promote the convenience of the public in passing from one part of a neighborhood to another over uninclosed land where there are no public roads. The public can have no interest in a crossing within the inclosure of a private individual. The right of a railroad company to the unobstructed use of its way is property, and not a mere franchise. Johnson *v.* Railway Co., 116 Ill. 521. Admitting, then, that the object of the statute in providing for crossings outside of inclosures if to subserve a public use, the question arises, Can the way of a railroad be appropriated in the manner provided in the statute, and without compensation to the company? The constitution leaves the manner in which highways may be established, and public property taken for that purpose, to the wisdom of the legislature, subject, however, as we think, to certain fundamental principles. Our legislature has delegated the authority to open public roads to the body known to the constitution as the commissioners' court. It may be that it had power to confer this authority upon some other board of officers to be duly elected or appointed and qualified. But that it cannot authorize any two or more of the citizens of the State arbitrarily to exercise this power is too clear for argument. In Rhine *v.* City of McKinney 53, Tex. 354, it is held that so much of the act of March 15, 1875, for the incorporation of cities or towns, as authorized the city council to appoint three disinterested free-holders to assess the value of property sought to be condemned is unconstitutional. The decision is placed upon the ground that the city council was one of the parties to the proceeding, and that it was not due course of law to permit it to select all the assessors who were to place a valuation upon the property. If the interest of the council is to be identified with that of the city, and it is to be held as not standing impartial between the municipality and the citizen, this is very sound law. The effect of the provision in question in this case is to enable any two citizens owning land or residing within five miles of a point on a railroad within a mile and a half of which there is no crossing, though actuated solely by selfish or

malicious motives, to require the company to establish a public way across its track, notwithstanding such way has no connection with any other way over which the public has the right to pass. As a result of such an exercise of power, it might occur that after the company had made the crossing, and incurred the consequent expense of adjusting their fence and erecting cattle-guards, the owner of the land upon either side would fence his premises, and thereby render the opening across the track useless for any purpose. This can hardly be deemed an extreme case or an improbable occurrence, and seems to illustrate the arbitrary character of the provision of the statute now under consideration. The statutes have conferred upon the commissioners' courts the power to establish public roads of the first, second, and third classes, to be maintained by the public (Rev. St. arts. 4361–4364), and also neighborhood roads which are not required to be worked by the road hands (Rev. St. arts. 4379–4386); and these would seem sufficient to meet all necessary wants of the public. If not, additional authority could properly be conferred upon that court.

For the reasons stated, we are of opinion that this provision cannot be sustained upon the ground that it is for the benefit of the public; and it is not necessary for us to decide whether the legislature can authorize the establishment of a highway across a railroad track without making compensation for the burden thereby imposed. Upon this question there is a conflict of decision.[1] In Massachusetts it is held that this cannot be done, (Railroad Co. *v.* Plymouth Co., 14 Gray, 155); but a contrary doctrine is held in New York (Railroad Co. *v.* Greenbush, 52 N. Y. 510; Railroad Co. *v.* Brownell, 24 N. Y. 345). The presumption that, in granting a charter to a railroad company, the legislature reserved a right to lay out public roads across its track without compensation, is much stronger in case of a sparsely-settled State than in one which is already densely populated; and it may be that for this reason our courts should follow the rule of the New York decisions.

Nor do we think the provision in question can be sustained as an exercise of the police power. The opening of crossings over a railroad track, such as are provided for in this statute, is not calculated to promote the safety of persons or property, but rather to increase the danger. So far as the owner whose land is intersected by the railroad is concerned, the want of a crossing doubtless injuriously affects the use of his property, and we have held that he is entitled to his reasonably necessary crossings, but that the company cannot be compelled to bear the

[1] See Boston & M. R. Co. *v.* County Comm'rs, 32 Am. & Eng. R. R. Cas. 271, note, 276.

burden of putting them in after he has been compensated for this expense. As we have said in the Rowland Case we say in this, that as to the rights of way acquired since the act in question went into effect the statute may be enforced as between the land-owner and the railroad company.

For the errors stated, the judgment will be reversed, and here rendered for appellant.

CANADA SOUTHERN R. CO.

v.

GEORGE CLOUSE.

(13 *Can. S. C. Rep.* 139.)

Farm Crossing—Liability of Company—Agreement with Agent.—The C. S. R. Co. having taken for the purposes of their railway the lands of C., made a verbal agreement with C., through their agent T., for the purchase of such lands, for which they agreed to pay $662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid. The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction.

Held (Ritchie, C.J., dissenting), that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm. *Held*, also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the master of the court below.

Same—Statute—Construction.—The substitution of the word "at" in sec. 13 of chap. 66 of the Consolidated Statutes of Canada, for the word "and" in sec. 13 of chap. 51 of 14 and 15 Vic. is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect.

APPEAL from a decision of the Court of Appeal for Ontario (11 Ont. App. R. 287) varying the decree of Mr. Justice Proudfoot in the Chancery division of the High Court of Justice (4 O. R. 28).

The facts of the case are as follows:

The plaintiff in his statement of claim alleges that in the month of March, 1871, he entered into a verbal agreement with the defendants through their agent, John Avery Tracey, for the sale by the plaintiff to the defendants of $7\frac{21}{100}$ acres of land of the plaintiff's taken by the defendants for the purposes of their railway for which it was then agreed that the defendants should pay the plaintiff $662 and should make five farm crossings across the railway on plaintiff's farm; that three of such crossings should be level crossings and the other two under crossings; and that one of such under crossings should be of sufficient height and width to admit of this passage through it from one part of plaintiff's farm to the other, of loads of grain and hay, reaping and mowing machines, and that such crossings should be kept and maintained by the defendants for all time for the use of the plaintiff, his heirs and assigns; that at the time when said agreement was entered into the plaintiff was desirous that the same should be reduced to writing and signed by himself and the said Tracey for and on behalf of the defendants, and that he particularly requested said Tracey to reduce to writing and sign that part of the said agreement relating to the farm crossings to be made and maintained by defendants for the use of the plaintiff, but that said Tracey assured the plaintiff that a writing was unnecessary and that the law would compel defendants to build and maintain said crossings although the agreement with reference thereto was not in writing, and the plaintiff believing such representations, and relying thereon, did not further insist upon the said agreement being reduced to writing; that in pursuance of said agreement the plaintiff, by indenture bearing date the 16th day of March, 1871, duly conveyed the said $7\frac{21}{100}$ acres of land to defendants, and the defendants took possession of the same and paid the plaintiff the money consideration agreed upon therefor, and built their railway upon and along said parcel of land and furnished the several level and under crossings so stipulated for and agreed upon between plaintiff and defendants as aforesaid, and have maintained the same for the use of the plaintiff who has used the same without any interruption or hindrance from the time the said railway

was built until the 8th of October, 1881, on which day the defendants caused the larger of the said two under crossings to be boarded up so as to render it impassable by, and useless to, the plaintiff, and on several occasions since the defendants have caused the said under crossings to be partly filled up with earth and rubbish, and the plaintiff has been put to great trouble and expense in removing such earth and other obstacles from the said under crossings, and rendering them fit for use by the plaintiff, and the plaintiff claimed: 1. Damages for the wrongs complained of. 2. An order restraining the defendants from any repetition of any of the acts complained of. 3. Such further relief as the nature of the case might require.

The defendants, in their statement of defence, admit that Tracey was a purchasing agent of theirs for right of way; but they say that the sum paid to the plaintiff was not merely for the expropriation of his land, but was also for all damages to his property through which the right of way was taken, in so far as it was injuriously affected. They deny that Tracey made any bargain or contract with the plaintiffs for three level and two under crossings, as alleged in the plaintiff's statement of claim; that if he did he had no authority from the defendants to make the alleged promises, and that the defendants are not bound thereby; and they deny that the plaintiff is entitled to the larger under crossing, in respect of which the action is brought, or to any under crossing, or that the defendants are liable to furnish and maintain the same. They also deny that they furnished the under crossings in the plaintiff's claim mentioned in pursuance of any agreement; that at the places where the two alleged under crossings are there were depressions in the ground which the defendants bridged over instead of filling up, for economy, intending that these and similar other depressions along the line of their railway should be filled up with earth as soon as they should have the means to do so, and the superstructures over such depressions should require renewal; and that, although they were always ready and willing to allow land-owners to use these places as under crossings, and afforded them facilities for using them as such, it never was the intention of the defendants that the plaintiff, or persons similarly situated, should have the right to use these crossings permanently, and they averred that they had furnished the plaintiff with good and suitable over crossings, and they denied that they are legally bound to furnish him with any others; and they finally pleaded the statute of frauds as a bar to the action.

Mr. Justice Proudfoot made a decree in the plaintiff's favor, granting to him a perpetual injunction restraining the defendants from interfering with, hindering or obstructing the plaintiff in his possession, use, and enjoyment of the under crossing under

the defendants' railway, and lots Nos. 10 & 11 in the 8th concession of the Township of Townsend. The defendants appealed to the court of appeal for Ontario from this decree, and that court varied the decree, making it as varied read as a decree granting the plaintiff an injunction restraining the defendants from interfering with, hindering or obstructing the plaintiff in the use and enjoyment of the under crossing under the defendant's railway, etc., until compensation shall have been made, in pursuance of the provisions of the statutes in that behalf, for the additional injury to the plaintiff's farm from any further exercise of the power of the company by which the plaintiff may be deprived of the said under crossing, and with these variations and directions the defendants' appeal was dismissed without costs.

From the decree so varied both parties appeal, the defendants insisting that the plaintiff's action should have been wholly dismissed, and the plaintiff that the original decree as made by Mr. Justice Proudfoot should not have been varied.

Cuttanach for appellants.

McCarthy, Q.C., and *Robb* for respondent.

Sir W. J. RITCHIE, C.J.—I think it clear that at the time the agreement was entered into the erection of a trestle bridge only was in the contemplation of the company and the agreement was made in reference to that. If the defendants had intended the agreement to be only temporary that should have been stipulated for; or if they intended to reserve to themselves the right to dispense with the trestle bridge at their own free will and pleasure, and substitute a solid embankment in lieu thereof, that should have been provided for; not having done so, I think plaintiff should have his under crossing. If it is more to the interest of the defendants that there should be a new embankment in lieu of a trestle bridge, they must so construct the embankment as to preserve the plaintiff's subway, or adopt such proceedings as will deprive the plaintiff of his under crossing, and compensate him therefor.

Plaintiff entitled to under crossing—Intention of defendants.

I cannot think that having obtained the plaintiff's land at a reduced price by reason of the agreement that he should have one pass under the bridge it could have been intended by either party that the company were, the next day, at their own will and pleasure, to abandon the trestle bridge and adopt a solid embankment, and so deprive the plaintiff of his pass, he having accepted a reduced price for his land under a clear agreement that he was to have an underground crossing. I think if the defendants find it more to their interest to change the trestle bridge and substitute an embankment, they must so construct the embankment as to give the plaintiff what he, by taking a

reduced sum for his land, has paid for it, even though the change and substitution mentioned should thereby involve an increased expenditure.

It is admitted that Tracey was the agent to secure the land for the right of way for the company, and I think, as incidental to that, he was clothed with authority to make agreements with the parties whose lands he was negotiating for with reference to crossings in connection therewith, not only with reference to their location, but also as to their natures. I think the evidence in this case very clearly shows that he did so; that the result of his dealings with the plaintiff was communicated to the officers of the company and acted upon by the company and the plaintiff; that to carry out the agreement, and enable the plaintiff to use and enjoy the privilege agreed on, a change was made in the construction of the trestle bridge by the company, and the plaintiff entered on the enjoyment of the way thus agreed on and arranged by the company, and has used the same, without interruption for a number of years. I think there was evidence of the agreement and of its ratification by the company, and that the vice chancellor was right in holding that there was a concluded agreement for an under crossing. This crossing would appear to be a necessity for the plaintiff; he has bought it and paid for it by the reduced price of his land, and should not now be deprived of it because the defendants wish to change the trestle bridge to an embankment. If they do so the will be obliged to incur extra expense to furnish the plaintiff with his under crossing. Plaintiff has a right to the enjoyment of his under crossing until it is taken from him by legal means.

Authority of agent—Ratification of agreement.

This, in my opinion, is the state of the case as it now stands. I do not think it necessary to enter on any discussion as to what the railway company might or might not do if they think it desirable to change from a trestle to an absolutely solid embankment, under the 11th section of the Consolidated Statutes of Canada, ch. 66. As suggested by Mr. Justice Patterson, they have not taken any steps in that direction.

It being abundantly clear that the under crossing was taken into consideration in fixing the amount the plaintiff was to receive and the company to pay if the company find it desirable to build a close embankment and so make a complete severance of the plaintiff's farm, for which they have paid him no compensation, they must, by legal means, obtain the right and pay for it before altering the existing state of things.

Right to build solid embankment.

I think there is no objections to vary the decree as suggested

by Mr. Justice Patterson, and that the appeal must be dismissed with costs.

FOURNIER, J., was of opinion that the appeal should be allowed.

HENRY, J.—I am of opinion that the agent had authority from the company to make special arrangements to a certain extent; but the ratification of his agreement only carried out the object of the company in making the contract with Clouse. They undertook to put up a trestle bridge, and they did so. It was no object to them to have the use of an underground passage. They merely authorized the agent to arrange with parties for the damages which they had sustained, and I do not think it amounted to the extent of authorizing him to bind the company to give the party a useless crossing, and one which the law would not supply; and therefore I am rather of the opinion that Clouse is not entitled to the crossing. **Authority of agent.**

The law provides in such a case for the appointment of arbitrators, and I do not think that arbitrators would have power under the act to award an under-crossing under these circumstances. I do not think the law would give them any such power. **Arbitrators.**

The condition of these lands have altered since this agreement was made. A crossing for a two-hundred-acre lot would be very different in the eye of the law from that required for a fifty-acre lot. A party has a two-hundred-acre lot divided into lots of fifty acres each; and, if he remains owner of the two-hundred-acre lot, the necessity of a crossing for each fifty acres would not be so apparent as it is now, when he only has the fifty acres. He should have an agreement for a special crossing. **Condition of lands—Size of lots.**

I concur in the judgment of my brother Gwynne, and think the appeal should be allowed.

TASCHEREAU, J.—I have come to the same conclusion, on the same grounds. I think the plaintiff is not entitled to an under-crossing. The appeal should be allowed and the cross-appeal dismissed.

GWYNNE, J. —In order to arrive at a just conclusion as to what should be done in this case, it is necessary to consider what were the rights of the parties, and what their position towards each other was at the time of the promise being made, if any was made, by Tracey, as the defendant's agent, in respect of the under-crossings, the **Questions to be considered.**

right to the perpetual enjoyment of which the plaintiff claims. What was the extent of Tracey's authority as the defendant's agent? What was the promise which, in fact, if any, was made by him? and what was the actual consideration for such promise?

Defendants in position to enter into agreement.

It was not disputed, but was rather assumed, that the defendants had filed a map or plan of their proposed railway, with a book of reference, as required by the statute, preliminary to their taking measures to acquire the land required by them for their railway and works by compulsory expropriation under the statute; and that they were in a position, therefore, to enter into an agreement with him, touching the compensation to be paid to him for the land intended to be taken, and for any damage which might be sustained by him from the manner in which they should exercise the powers vested in them. In order to proceed by compulsory expropriation, it was necessary that they should have served on the plaintiff a notice containing a description of the lands to be taken and of the powers intended to be exercised with regard to the lands, and a declaration of readiness to pay some certain sum as compensation for the land to be taken and for such damages as might be occasioned to the plaintiff by the manner in which they proposed to construct their railway upon the lands so taken. The plaintiff had no power to resist the acquisition, by the defendants, of so much of the plaintiff's land as they required for the purposes of their railway, provided only that the land required was within the limits authorized by the statute; nor had the plaintiff any right to impose upon the defendants any obligation as a condition upon which alone he would consent to their having the land they required. The

Plaintiff's right at time agreement was made.

plaintiff's sole right at the time the agreement was made with Tracey consisted in the right of determining, by agreement *inter partes* if possible, and if not, of having determined by arbitration under the statute, the amount he should receive by way of compensation for the land taken from him and for such damage, if any, as the construction of the defendant's railway through his farm might occasion to him over and above the mere value of the land taken. This latter value might possibly be easily agreed upon; but the amount of compensation to be paid for the damage, if any, which might be occasioned to the plaintiff by the manner in which the defendants proposed to construct their railway through his farm might not be so easy of adjustment. In order to enable a land-owner to make a fair estimate of the damage thus occasioned to him, it is but reasonable that the railway company should show him in what manner and with what description of work it is proposed that the railway should be carried through his land, namely, whether on the level through-

out, or partly on the level and partly on an embankment, or in a deep cutting; and what mode of crossing is proposed to be supplied to enable the land-owner to have access to his land on both sides, namely, whether by farm-crossings on the level or by under or over crossings, or in one place by one kind, and in another by one of the other kind. Unless information upon these particulars should be afforded, the land-owner could not, although willing to come to terms with the company, nor, in case he should prefer submitting his case to arbitration under the statute, could arbitrators form an accurate judgment as to the amount of compensation the land-owner should receive for the damage which might be occasioned to him by the railway. The plaintiff here could not have imposed upon the defendants the obligation that they should give him at the place indicated here a permanent under crossing as a condition of their acquiring the land required for roadway through his farm. If the defendants thought that they could not conveniently, or consistently with a proper regard to their own interests, in view, for example, of the great expense of such a work, grant him such an under crossing, but that they could give him a surface crossing, or surface crossings, which, although not as convenient as the under crossing he desires to have might be, still would afford some degree of convenience, all, if anything, that the plaintiff could claim would be reasonable compensation in money for the damage, if any, which might be occasioned to him by the difference in the convenience afforded to him by the surface crossings, and in that which the under crossing, if granted, would afford to him. The defendants admit that Tracey was their agent for acquiring right of way. He had their authority to agree with the plaintiff upon the price to be paid for the land taken, and also upon the amount to be paid by way of compensation for such damage as might be occasioned by the manner in which it was intended that the railway should be constructed through his farm. For this purpose it was necessary that he should be in a position to show in what manner the work was intended to be constructed. The defendants had put Tracey in such a position as their agent to deal with the plaintiff as to the amount of compensation to be paid to him that although he had not, and I think it clear that he had not, any authority vested in him to bind the defendants to give to the plaintiff a permanent under crossing, as claimed by him, still it was necessary that the defendants' agent should be in a position to show the nature of the works contemplated by the defendants to enable the plaintiff intelligently to estimate the amount of damage done to him for which he might be entitled to receive compensation, and to enable him to determine whether he should himself conclude an agreement with the defendants, or should, in

Defendants' agent—His authority.

preference, have recourse to the measures provided by law for obtaining satisfaction in the absence of agreement. As to surface crossings, there does not appear to have been any difficulty; one has been given on each fifty acres, into which the plaintiff has divided his lot of two hundred acres, one of which divisions of fifty acres, and only one, he retains as his own, having apportioned the others among his children. A depression in a portion of the fifty acres retained by the plaintiff, which the railway would have to cross, indicated that an embankment would have to be constructed at some time, the expense of constructing an under crossing through which, might be so great that the defendants might reasonably be expected to be unwilling to give such a crossing. The plaintiff, I think, seems to have entertained some such idea, for when asked by Tracey what he wanted for right of way, he replied, as appears by his own evidence, "that the farm was so cut up that he did not see how he could have anything handy." The evidence shows that the defendants' intention was to cross this depression in the land at first by trestle work, with a bridge on it across a little stream which ran there through the lot, as a temporary expedient, such trestle work to be replaced at some subsequent time when the defendants should be better able to afford the expense, by a solid embankment, with a culvert in it sufficiently large for the waters of the little stream to pass through it. That a trestle work was the mode designed to be adopted in the first instance Tracey knew, as probably also did the plaintiff. Boughner, who is the witness to the agreement subsequently signed by the plaintiff, says that he was present when the plaintiff and Tracey were negotiating about the price to be paid to the plaintiff, and that Tracey suggested that there would be a good chance for an under crossing on the banks of the creek. Tracey himself, while he swears that he had no authority to agree, and that he never did agree with the plaintiff that he should have a permanent under crossing, admits that he did say that there was a chance for the plaintiff to pass under the bridge, and that he also said that the law gave all necessary crossings, and that plaintiff would get all necessary crossings. He admits also that he entered in his private memorandum book the words: "Settled with Clouse he can have one pass under bridge," which he says he so entered because, knowing of the trestle work intended to be constructed, he knew there was a chance for a pass under the bridge; and he swears that he had nothing to do with the crossing business except upon three or four occasions for which he received special instructions from Mr. Courtwright, who appears to have been a contractor for building the road. He

Surface and under crossings.

Agent's settlement with plaintiff.

never received any instructions from the board of directors, nor from any one but Mr. Courtwright. In the view which I take, nothing turns upon any contradiction there may be in the evidence of the witnesses or any of them. In the actual facts which occurred, there does not appear to be much substantial difference; it was in the view which each took of what did take place that the difference exists. Tracey's view of the question of crossings, it appears to have been, that this was a subject with which he, as agent merely for acquiring right of way, had nothing to do; that the law would give the plaintiff all necessary crossings; and I can well understand that in pointing out that by reason of the trestle work which was intended to be put up, the plaintiff might get, or have an opportunity to get, the under crossing he wanted to have, he never contemplated by this suggestion, or by anything he said, or by the memorandum entered in his book, that he should be understood as making, or as having made, any contract on behalf of the defendants that the plaintiff should have such a crossing, or that he was imposing any obligation upon the defendants to give it. In the view which I take, the case may be determined upon what appears to me to be the true construction of the result of the evidence as given by the plaintiff himself.

Agent's view of crossing question.

In his letter of the 18th July, 1882, to the chief engineer of the defendants' company, he says that his original demand was $1000 for right of way and damages. I take this sum to be more accurate than the sum of $1200, which the plaintiff on his examination in chief in the cause states to be the amount he first demanded when, as he says, his farm was so cut up that he did not see how he could have anything handy. It was then, according to plaintiff's evidence, that Tracey suggested that plaintiff could have this under crossing. Plaintiff says that he suggested that he should have some writing to that effect, but that Tracey said there was no need of it, that the law provided that people should have such crossings as were necessary to cross their farms, and that Mr. Boughner lived handy and would see that plaintiff should get it all right; before finally closing with Tracey, the plaintiff consulted his lawyer, a Mr. Duncombe, who also told him that it was not necessary to have an agreement about crossings in writing, and that he would get them all right; that the law would give the crossings; that the statute provided for it.

Evidence given by plaintiff.

That the plaintiff consulted Mr. Duncombe with a view to govern his conduct in negotiating with Tracey for the land taken there can be no doubt upon the plaintiff's own evidence; and Mr. Duncombe advised him that there was no necessity for any

writing as to crossings, for that the law would give them. This appears to have been the general opinion. Tracey admits that he was of that opinion also, and that he so expressed himself. So advised, the plaintiff finally entered into an agreement with Tracey bearing date the 23d of January, 1871, which was signed by the plaintiff, whereby he agreed to convey to the defendants, by a proper deed with bar of dower, so much of lots 10 & 11 in the 8th concession of the Township of Townsend, in the County of Norfolk as is taken by the company for its line of railway containing $7\frac{91}{100}$ acres for the sum of $650 to be paid within 30 days of the date of the said agreement, being for price of land $540.75, and for price of damages $109.25, and the plaintiff thereby granted leave to the defendants to take possession at once for the purpose of prosecuting the work of grading.

Same—Inference to be drawn.

Now, the true inference to be drawn from the above is that the plaintiff being advised by his counsel that there was no necessity for any writing relating to crossings, and that the law sufficiently made provision for them, deducted from the amount which he originally asked, upon the assumption that he was not to have the particular under crossing in question, the sum of $350 intending to rest upon his legal rights to secure him the crossings he required. The plaintiff very probably considered that what Tracey had said constituted a sufficient location for an under crossing, or he may have thought, under the legal opinion he had taken, that he had the right to locate his farm crossings, but it is clear, I think, that he relied upon the law to secure them to him and not upon any contract made with the defendants through Tracey as their agent, and he concluded his bargain for right of way and damages, which was reduced to writing and signed by him as a transaction wholly independent of all consideration of farm crossings and his rights thereto whatever they might be under the statute; and upon the 16th March following, he executed a deed whereby, in consideration of $662 then paid to him, he granted and confirmed to the defendants, their suceessors and assigns forever, the lands taken for their railway. Under these circumstances the plaintiff cannot, in my opinion, be now heard to say that he executed this deed upon condition of his having a permanent under crossing at the place in question or elsewhere; or even that a verbal agreement that he should have it constituted part of the consideration for his executing the deed granting the land for the railway—the two things constitute quite distinct transactions and were understood so to be—the one relating to the land required for the railway which was complete for the consideration stated in the agreement, and the other relating to crossings of the railway on the plaintiff's farm, as to which the plaintiff

relied upon the law to secure them to him wholly apart from, and independently of, the agreement for the land. The plaintiff's case cannot either, in my opinion, be rested upon the allegation that the plaintiff was prevented by any fraud of the defendants, acting through their agent, from having an agreement verbally complete reduced to writing and signed, nor upon the contention that a verbal agreement was entered into which should be enforced against the defendants upon the ground that the plaintiff, upon the faith of the defendants performing their part, had faithfully performed his part of the same agreement. The plaintiff's legal and equitable right, if he has any, as to his under crossing cannot under the circumstances appearing in evidence be rested upon contract, but must be determined upon view of the statute law in virtue of which alone the defendants acquired the right of interfering in any manner with the plaintiff's property. What those rights are involves the necessity of reviewing the decision of the Court of Common Pleas for Ontario in Brown *v.* Toronto and Nipissing R. Co., 26 U. C. C. P. 206; I was a party to that judgment, but I must confess that on further consideration I do not think it can be supported. I do not think that the substitution of the word "at" in section 13 of chapter 66 of the Consolidated Statutes of Canada, for the word "and," which was the word used in section 13 of ch. 51 of 14 and 15 Vic., makes any difference in the construction of the section. In view of the identity of the language of the statute of the State of New York, of 1850, ch. 140, sec. 44, there cannot, I think, be a doubt that sec. 13 of our statute, 14 and 15 Vic. ch. 51, was taken from the statute of the State of New York. So, in like manner, I think that our amended section 13, as consolidated in chapter 66 of the Consolidated Statutes, was taken from the statutes of the State of New York of 1854, ch. 282, sec. 8, substituting the word "at" for "and." In the courts of the State of New York this amendment has not been considered to make any difference in the construction, and that it should not is, I think, the right conclusion. The amendment, indeed, appears to me to have been to make the section more perfect than it originally was, and to express what was intended but was omitted in the section as it was. The word "and" being, by inadvertence as I think, used instead of "at," the section failed to express where the "openings, gates, or bars in the fences" were to be. The section ran thus:—

Plaintiff's right determined upon view of statute —Authorities reviewed.

"Fences shall be erected and maintained on each side of the railway of the height and strength of an ordinary division fence, with openings or gates or bars therein, and farm crossings for the use of the proprietors of the lands adjoining the railway."

Now it will be observed that this sentence fails to express where the "openings or gates or bars" were to be; they were to be, in the fences, but in what part is not said, and yet it cannot be doubted that they were intended to be "at the farm crossings of the road for the use of the proprietors of the lands adjoining the railway." The substitution of "at" in the Consolidated Statutes for "and" precisely expresses this intention. The statute so amended is, in my opinion, to be construed as regarding "farm crossings" to be a necessary convenience for the use of the proprietors of the lands adjoining the railway when one part of a man's property is separated from the residue by the railway and to which necessary convenience such proprietor is entitled as of right, unless it shall appear that he has released and abandoned his right upon receiving compensation from the railway company in consideration of their depriving him of such necessary convenience. A railway may be so run across a man's property as to separate only a small angle from the rest of his farm; in such a case a farm crossing might not be necessary; but when a substantial part of a farm is separated by a railway from another substantial part, or a man's house is separated from his barn or stables or the like, then farm crossings constitute such a necessary requisite to the beneficial enjoyment of his property by the owner that no man can be deprived of them otherwise than by an instrument to that effect voluntarily executed by him or upon receipt of compensation adjudged to him by process of law, and the ordinary courts of the country are the courts wherein all differences between parties as to the nature, location and number of the crossings they are entitled to have, and all other matters incidentally arising are to be adjudicated upon and determined. These courts having jurisdiction to compel the construction of all such crossings as can be reasonably required have jurisdiction over every matter incidentally arising, and can, therefore, award pecuniary compensation also, if it should appear to be more reasonable that the land-owner should be supplied with a less convenient crossing, with pecuniary compensation for difference in convenience, than that the railway company should be compelled specifically to give a more convenient crossing, as, for example, an under crossing, which, although it would afford the utmost amount of convenience, could be constructed only at a cost altogether disproportionate to the value of the farm upon which it was desired to be constructed, or disproportionate to the convenience which, when constructed, it would afford. The interests of both parties must in all cases be equitably consulted. It would be quite unjust to compel a railway company to construct an under crossing through an embankment, the cost of constructing

When farm crossings are necessary.

Jurisdiction of courts.

which would be quite disproportionate to the value of the land separated or in excess of fair compensation for the injury the farmer might sustain from his not having such particular crossing, if a reasonably convenient crossing through it may be less convenient can be given elsewhere. The court, no doubt, has the power, in a proper case, to compel by its decree a railway company to construct an under crossing, instead of rendering satisfaction in damages to the farmer for his not having such a crossing, and this power and jurisdiction is founded not upon any contract, but is an inherent power in the court, arising of necessity to enable it to do justice between the parties. Whether the court shall or not exercise this jurisdiction is quite discretionary with it in view of the circumstances of each particular case. The defendants, by giving to the plaintiff for the period of eleven years, permission to cross the railway under the trestle work which was but a temporary construction, have not, I think, become absolutely bound to give to the plaintiff an under crossing through a permanent embankment substituted now for the trestle work; the question, however, of what would be reasonably sufficient crossings is still open to the court which is bound to weigh in an equal scale the interests of both parties. The learned judge who tried this case has expressed the opinion that from the nature of the ground the under crossing claimed is of such importance to the plaintiff that adequate compensation cannot be given to him in damages. I must say that I fail to see the evidence upon which this opinion is founded, and I cannot well see how it can be supported in the presence of the evidence of the plaintiff himself, who seems to have valued the want of it at $350, the amount by which he reduced his claim, which was for $1000, when he was under the impression that he could not have this under crossing, to $650 when he understood that he could have it, thus, in effect, signifying his own estimate of the injury the want of the under crossing would do to him to be $350. Now, the evidence shows that the cost to the defendants of the crossing under the permanent embankment proposed to be constructed would be from $2500 to $3000, a sum of money so disproportionate to the plaintiff's own estimate of the amount he should have received on the supposition that he was not to have it (and I cannot but think also to the value of this little farm of the plaintiff's, consisting only of 50 acres) that I do not think a case is made which justifies the decree which was made in the court of first instance. The defendants, it is admitted, have already supplied one surface crossing upon this little farm; if another, or more, is or are reasonably necessary for the convenient enjoy-

Plaintiff not entitled to under crossing.

Compensation in damages.

Cost of under crossing disproportionate to plaintiff's damage.

ment of his farm by the plaintiff he is entitled to them, and he is entitled to have that question inquired into and determined by the court in this action, which is so framed that the court can award whatever relief the plaintiff may be entitled to and the nature of the case may require. The court is by the suit in possession of the whole case, and in the suit the rights of the parties must be conclusively determined, instead of remitting the case to the arbitrators to award compensation, the course which is directed by the decree as varied by the court of appeal for Ontario.

The opinion which I have above expressed is founded upon, and is supported by, decisions of the court of appeals for the State of New York, in cases upon statutes similarly worded and which (concurring as I do in their soundness) I do not hesitate to adopt. The cases I refer to are Wademan *v.* Albany & Susquehanna R. Co. 51 N. Y. 570; Clarke *v.* Rochester, Lockport & N. F. R. Co., 18 Barb. 350; Smith *v.* N. Y. & Oswego R. Co., 63 N. Y. 61; Jones *v.* Sleighman, 81 N. Y. 194; s. c., 3 Am. & Eng. R. R. Cas. 236.

New York cases.

The result at which I have arrived is that the decree of the court of first instance should be varied as follows:

Decree.

Declare that the plaintiff is entitled to have constructed and maintained for him by the defendants all farm crossings reasonably required, as necessary for the beneficial enjoyment of the lands separated by the defendant's railway as it passes through his farm of 50 acres in the pleadings mentioned. Refer it to the master to inquire and report whether the one surface crossing already supplied by the defendants is reasonably sufficient for the enjoyment of his farm by the plaintiff, and if not in his opinion so reasonably sufficient then and in that case he is to inquire and report how many crossings, and where situate the defendants are willing to supply, or it would be reasonable to require that they should supply.

Dissolve the interlocutory injunction; reserve all further consideration with costs.

Allow the appeal of the defendants, the railway company, and dismiss the cross-appeal of the plaintiff with costs.

Appeal allowed and cross-appeal dismissed with costs.

Kingsmill, Cattenach & Symons for appellants.

Tisdale & Robb for respondents.

Farm Crossings.—See, *ante*, Gulf, C. & S. F. R. Co. *v.* Rowland, 289, and note, 292, *post*, Canada Southern R. Co. *v.* Erwin, next case.

CANADA SOUTHERN R. CO.

v.

ERWIN.

(13 *Can. S. C. Rep.* 162.)

Farm-crossing—Agreement for Cattle-pass—Construction—Substitution of Embankment.—In negotiating for the sale of lands taken by the Canada Southern R. Co. for the purposes of their railway, the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should "have liberty to remove for his own use all buildings on the said right of way; and that, in the event of their being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle the company will so construct their fence to each side thereof as not to impede the passage thereunder," *Held*, reversing the judgment of the court below, Ritchie, C.J., dissenting, that under this agreement the only obligation on the country was to maintain a cattle-pass so long as the trestle bridge was in existence and did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor without providing a pass under such embankment.

APPEAL from a decision of the Court of Appeal for Ontario, varying a decree of Mr. Justice Ferguson in the Chancery Division of the High Court of Justice.

The facts of the case are similar to those of the Canada Southern *v.* Clouse, and will be found set out in the reports of both cases in the courts below and in the judgment of Mr. Justice Gwynne.

This appeal was heard at the same time as the appeal in Clouse's case, the same counsel appearing for the parties respectively.

Present: Sir W. J. Ritchie, C.J., and Fournier, Henry, Taschereau, and Gwynne, JJ.

Kingsmill, Catanach, and *Symons*, solicitors for appellant.

Tisdale & Robb, solicitors for respondent.

Sir W. J. RITCHIE, C.J.—I agree with Mr. Justice Patterson, that the right of the plaintiff is to have the state of things which has existed for the last ten years maintained, unless and until the company shall proceed under the statute to acquire a right to do what they now propose to do.

I am of opinion that the appeal should be dismissed.

GWYNNE, J.—This case differs from that of Clouse against

the same defendants (*ante*, p.) in this that an agreement was reduced to writing by the solicitor of the company, which was witnessed by him and signed by Mr. Tracey at the time that Smith, the then owner of the land of which the plaintiff is now proprietor, executed a deed granting to the defendants the land taken for their railway on lot No. 12 in the 9th concession of Townsend. This agreement is as follows:

Agreement between plaintiff and defendant.

"The Canada Southern R. Co., by John Avery Tracey, their duly constituted agent for the purchase of right of way, do hereby agree with James H. Smith, the owner of lot twelve in the ninth concession of Townsend, his heirs and assigns, as follows:

"The said Smith having sold to the said company the right of way over lot number twelve in the ninth concession of the Township of Townsend, containing four acres and seventeen hundredths of an acre, at and for the price of one thousand six hundred and fifty dollars, and having given a conveyance to the said company for the same, it is hereby, notwithstanding such conveyance, agreed between the said parties that for the period of five years from the date of this agreement the said Smith, his heirs and assigns, shall have possession, undisturbed by the said railway company, of the woodshed, and ground on which it is erected, at the rear of his house and on the right of way so conveyed; and the fence of the said railway shall be so constructed as to leave a passage of at least five feet wide for the use of the said Smith, his heirs and assigns, between the said woodshed and the railway fence; and the said fence shall run from a point five feet south of the southeasterly corner of the said woodshed, in a straight line, to the southeasterly corner of a barn now standing on the fence line of the said railway, and shall so remain during the space of five years as aforesaid; and it is hereby agreed that the said company shall give such further assurance as may be deemed necessary to carry out this agreement, which is hereby declared part of the consideration for the said conveyance. Dated, September 26, 1871."

This instrument was signed by Tracey and witnessed by Mr. Kingsmill, the solicitor of the company. When the agreement was produced, Smith objected to it as insufficient in not providing for a cattle-pass and other things which he insisted had been agreed upon. Accordingly, Mr. Kingsmill wrote on the back of the said agreement a further clause, which was also signed by Tracey and witnessed by Mr. Kingsmill, which is as follows:

"It is further agreed, and it is to be taken as part of the within agreement, that the within-named Smith shall have liberty to remove for his own use all buildings on the said right of way; and it is also further agreed that, in the event of there being

constructed on the said lot a trestle bridge of sufficient height to allow of the passage of cattle, the said company will so construct their fence on each side thereof as not to impede the passage thereunder. Dated, September 26, 1871."

No case for the reformation of this agreement so as to make it an agreement for a perpetual cattle-pass under the railway at the place in question, whatever might be the character of the superstructure, has been established in evidence. The plaintiff's right, therefore, to recover in this suit must depend upon the construction of the agreement as it stands. The parties to the agreement must be regarded as being the best judges of what it was they were intending to provide for. Now, it is to be observed that the pass spoken of in the agreement is not a "farm-crossing," which, as I have already said in Clouse's case, is, in my opinion, a convenience which, unless a proprietor of lands severed by a railway accepts pecuniary compensation for being deprived of, or voluntarily releases his right thereto, is a necessity for the use and enjoyment of the severed lands which the law provides for apart from any contract. The language of the agreement is that—

Agreement construed—"Cattle pass."

"In the event of there being constructed a trestle bridge of sufficient height to allow of the passage of cattle, the company will so construct their fences on each side as not to impede the passage thereunder."

All that such language can be construed as providing for is a passage for cattle only, and that conditional upon there being a trestle bridge of sufficient height to permit of such a passage. This agreement so conditioned cannot be construed as depriving the company of the right to discontinue the trestle bridge, which was erected as a temporary structure, and to construct an embankment in its stead unless they shall construct a cattle-pass in the embankment. The agreement does not contemplate that there should be provided a cattle-pass under an embankment. As, then, the "cattle-pass" can only be claimed under the written agreement, the obligation of the company, which is to construct their fences so as not to impede the passage of cattle under a trestle bridge if such be erected of sufficient height so as to permit of the passage of cattle under it, cannot have any binding effect if and when the trestle bridge shall no longer exist. The two things are very different, namely, constructing fences so as to permit cattle to pass under a trestle bridge, and constructing an arch of sufficient dimensions to permit the passage of cattle under an embankment, the cost of which work might be in excess of the whole value of the severed lands. The plaintiff's statement of claim in this case should, in my opinion, have been dismissed with costs; but such dismissal

would not operate against any claim, if any, which the plaintiff may have under the law for such farm-crossings or farm-crossing as may be necessary for the reasonable enjoyment of the severed lands. The appeal of the defendants, therefore, in my opinion, in this case should be allowed with costs, and the statement of claim of the plaintiff be ordered to be dismissed in the court below, with costs.

Appeal allowed, and cross-appeal dismissed with costs.

FOURNIER, HENRY, and TASCHEREAU, JJ., concurred.

Farm-crossings.—See, *ante*, Gulf, C. & S. F. R. Co. *v.* Rowland, 286, and note, 292.

Agreements for Farm-crossings.—See Clouse *v.* Canada Southern R. Co., 14 Am. & Eng. R. R. Cas. 456; Murtdfeldt *v.* New York, etc., R. Co., 25 Ib. 144; Illinois Cent. R. Co. *v.* Millenborg, 26 Ib. 358; Canada So. R. Co. *v.* Clouse, *ante*, p. 396.

WELLS

v.

NORTHERN R. CO.

(14 *Ont. Rep.* 594.)

Farm Crossing—Subway—Easement—Prescription.—Where in building their road the defendants left a subway under a trestle bridge, and the evidence showed that the plaintiff, the owner of the land crossed by the railway at this point, had enjoyed the open and continuous user of this subway as of right ever since 1862, but that the defendants were now proceeding to fill it up, *held*, that though the plaintiff could not prevent the filling up of the subway, he was entitled to damages for his property in the easement.

Same—Lost Deed—Uninterrupted Enjoyment.—The plaintiff was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the railway company, which deed was lost, or he was entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right.

THIS was an action brought by Joseph Wells, as the owner of a certain farm over which the defendants had, in 1854, purchased a right of way from Joseph Gamble, the then owner.

In his statement of claim the plaintiff alleged that in constructing their railway the defendants built a subway beneath the same, on the said lands, sufficiently large to admit of the passage of cattle and wagons from one portion to the other for the accommodation of the owner of the farm; that since the

construction of the same, and until the time thereinafter mentioned, the said subway had remained unobstructed in any way, and had been continuously used by the successive owners of the farm as a means of transferring their cattle and produce from one portion of the farm to the other; that in the month of September, 1886, the defendants, notwithstanding their being remonstrated with and forbidden to do so by the plaintiff, built up the said subway with stone, leaving the plaintiff no means of transferring his cattle from one portion of his farm to the other except over the track of the defendants' railway; and the plaintiff claimed damages for such obstruction, and to have the said subway reopened.

The defendants pleaded "not guilty by statute," referring to the Consolidated Railway Act, 1879, 42 Vic. c. 9, sec. 27 (D.).

Ritchie, Q.C., and *R. Boultbee* for plaintiff.

S. H. Blake, Q.C., for defendants.

PROUDFOOT, J.—I think the plaintiff entitled to judgment.

In July, 1854, James Gamble sold to the defendants a part of lot 75, in the first concession of the township of King, for the construction of their road. Facts.

The road was constructed in 1858, and where the road crossed a depression in the ground a trestle bridge was built, and a subway left under it.

From 1862 till a few months before this action was brought the plaintiff, and those under whom he claims, enjoyed the undisturbed use of this subway. The defendants are filling, or have filled up this subway in order to make a solid track across the depression in the land, and refuse to make any compensation for it to the plaintiff. The evidence clearly establishes that the subway, owing to the formation of the land, was of great, if not essential, advantage to the owners of the lot.

The plaintiff asks for damages for the obstruction of the subway, and to have it reopened.

The defendants plead "not guilty," and refer to The Consolidated Railway Act, 1879, sec. 27.

The deed from Gamble to the defendants has been destroyed or lost, and evidence of its contents further than as appears upon the registry is not attainable, or has not been produced. And at the time when it was registered, it was registered in the then usual way by a memorial, which only gives notice that the land mentioned in it was conveyed, but does not, nor was it required in a memorial that it should, mention any condition or reservation that might have been contained in it. The subway was planked and kept in repair by the workmen employed by the defendants; and the planking extended to some distance on each side of the railway roadbed. A gate was also put up by

these workmen, and both planking and gate were renewed ten or more years ago, by the workmen of the defendants. There had been, originally, bars across the subway, but at the request of the land-owner the carpenter employed by the defendants substituted a gate for it. The gate was for the benefit of the land-owner.

On one occasion it appears that the land-owner applied to the "section boss" of the railway to make repairs to the subway, which he did not then do, not because the defendants were not liable to repair, but because he was then much engaged in looking after his section, and he asked the land-owner to do it as he had more time.

Subway enjoyed as a right.

Since 1862 the subway was in constant use by the land-owners, daily as some of the witnesses say, i.e., for a period of more than twenty years, without objection by the defendants; and in fact they must be taken to have assented to it, by the planking and repairing the subway and making and maintaining gates at the request of the land-owners. This, in my opinion, constitutes an enjoyment as of right.

The use was open and continuous. The "section boss" and his men passed daily over the road at this place; they worked at the subway itself, and any officer of the railway travelling over it in the cars could have seen it. The engineer of the defendants knew six years ago that cattle passed through the subway. The engineer says, in his evidence, that it was the duty of the "section boss" with his gang of men to go over this section every day, and for the last twenty-five years they must have done so. If necessary to affect the defendants with knowledge of the subway and its user, I think the evidence sufficiently proves it.

Plaintiff entitled to claim easement.

Under these circumstances it seems to me that the plaintiff is entitled to assume that there was a reservation of this subway in the deed from Gamble to the defendants; or he is entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right.

The case of Clouse *v.* The Canada Southern R. W. Co., 4 O. R. 28 (s. c., 15 Am. Eng. R. R. Cas. 456), 11 A. R. 287, 13 S. C. R. 139 (*ante*, p—), to which I was referred, is so different in its facts that it does not govern this. There the deed was produced, and contained no reservation; the user was only for about a period of ten years, and the conclusion the court came to, though not unanimously, was, that the plaintiff intended to rely only upon what the law would give him.

The plaintiff cannot prevent the filling up of the trestle work, but he is entitled to damages for his property in this easement.

I understood the defendants' counsel to say that if my decision was against them, he would not object to the damages being ascertained by the Master; but if I am mistaken in this, there will be an order requiring the defendants to have the compensation to be paid ascertained under the Railway Act.

The plaintiff is entitled to costs to the hearing. The subsequent costs, if not disposed of by the arbitrators, are reserved.

Farm Crossings.—See, *ante*, Gulf, C. & S. F. R. Co. *v.* Rowland, 286, and note, 292.

Same—Prescription.—See Turner *v.* Fitchburg R. Co., next case, and note.

TURNER

v.

FITCHBURG R. CO.

(*Massachusetts Supreme Judicial Court, January* 4, 1888.)

Crossing—Easement—Acquisition by Prescription.—The proprietor of lands may by open, adverse, and uninterrupted use for more than twenty years, acquire a right of way by prescription over the track of a railroad, notwithstanding the existence of statutes which prohibit under penalty the travelling upon or crossing of a railroad without the consent of the company.

APPEAL from the Superior Court, Franklin County.

Action to recover damages for interference with plaintiff's right of way across the railroad track. The defendant appeals from a judgment entered for the plaintiff by the superior court, after trial without a jury.

Perkins & Lyman for plaintiff.

George A. Torrey for defendant.

DEVENS, J.—The plaintiff, and those under whom he claims, have used a right of way "openly, adversely, and uninterruptedly" across the road of defendant for more than 20 years prior to the acts of defendant declared on. The most important question which the parties have presented is whether a private right of way by prescription can be acquired by an individual over the location of a railroad under the statutes as they now exist. That such a right of way may be acquired by reservation, by grant, or by agreement of parties is well established. Gas-Light Co. *v.* Railway Co., 14 Allen, 444; Gay *v.* Railroad Co.,

Question presented—Acquiring right of way by prescription.

141 Mass. 407. If such a right might be thus acquired, there would be nothing inconsistent in holding that it might be acquired by prescription, and that 20 years' adverse user would be evidence of a grant thereof. In Fisher *v.* Railroad Co., 135 Mass. 107, s. c., 17 Am. & Eng. R. R. Cas. 80, it was held that St. 1861, *c.* 100 (Pub. St. c. 112, § 215), which in substance provides that no length of possession or occupancy of land of a railroad corporation by an abutter shall create a right in such land to the abutter, would not prevent him from acquiring a right to a private way across the railroad by a 20-years' user thereof.

That which the defendant urges as the strongest argument against the plaintiff's having acquired a prescriptive right to cross the railroad track, is that, in order to have done so, he and his grantors must have continuously violated sections 195–198, Pub. St. c. 112, and that such violations could confer no rights on the violator.

Effect of statute forbidding going on track.

Section 195, imposing a penalty on any person "knowingly, without right," walking or standing on any railroad track, is first found in St. 1853, c. 414, § 4. Since that time it has been decided that in the case of a public way a right might be acquired by prescription, although the effect of this section of the statute was not discussed. Railroad Co. *v.* Page, 131 Mass. 391. There are intimations, also, since the statute of 1853, that a private way may be thus acquired. Gay *v.* Railroad Co., 141 Mass. 407; Wright *v.* Railroad Co., 142 Mass. 296, s. c., 18 Am. & Eng R. R. Cas 652; Deerfield *v.* Railroad Co., 144 Mass. 325. The defendant also relies on Pub. St. c. 112, § 198, making it penal to ride or drive a horse, without consent of a railroad corporation, on its road. Its contention as to both sections (195, 198) is that rights cannot be acquired by prescription against another, or his property, by acts done in violation of the absolute prohibition of a public statute that such acts, where expressly prohibited, are illegal in their inception and continuance, and cannot become lawful as against individual members of the public, however long they may have been exercised. It is urged that "when the statute forbids anything to be done, the right to do it is not to be granted or acquired." This contention, apparently drawn from the case of Brookline *v.* Mackintosh, 133 Mass. 225, is there applied to a claim of a prescriptive right to defile a stream of water, by pouring into it deleterious substances contrary to law, which right it was not in the power of any one to grant. Such an act for public reasons is expressly prohibited to all. The argument has no proper application where the act done is or is not lawful, according as it may have been done by right or with the consent of the party claiming to have been injured, or as it may have been done against right or without such

consent. The acts forbidden by sections 195, 198, are so only when done without consent, but they could be permitted by the railroad corporation. The right to maintain a private crossing is also one which the railroad might grant and to which it could give consent. The acts done in assertion of such a right, or by virtue of such an alleged consent, are not to be treated as originally wrongful, when they have been continued over 20 years, and when the party affected thereby has acquiesced for that length of time.

Possibility of acquiring easement over railroad.

The defendant further urges that it is impossible to gain a right of way over a railroad in actual operation, as the land of the railroad would be subject to the easement of the plaintiff, who might make use of it at his own pleasure. The case does not require us to define the exact limits of the right which the plaintiff has acquired. But it does not follow that even if he has an easement, it is not one which he is compelled to exercise, subject to the superior right of the railroad corporation to run its trains as it may determine to be proper for the general business of its road. There certainly may be an easement which will permit a way to be used only at particular times or seasons, or for particular purposes. As there may be by grant a right to cross a railroad when the trains of the corporation are not passing, so such an one may be acquired. It is said that the railroad has, under St. 1874, c. 401, a right to take lands for railroad purposes; that "lands" includes rights of way, and that if plaintiff's rights are interfered with, his remedy is by application to the county commissioners. This statute gives to the railroad company a right to relocate its railroad, and for that purpose, upon proper proceedings, to take other lands than those then occupied by it; but the case affords no evidence that such proceeding were had, nor does it appear that the agreed statement of facts was intended to bring any such question before us.

Acts done by plaintiff and defendant.

It must be assumed that the defendant had knowledge of the acts of the plaintiff, as they were open and adverse, although such knowledge is not stated in terms in the statement of facts. The statement also fails to show precisely what the acts of the defendant were, although it refers to them as those declared on. These are, as alleged in the declaration to have been, the erection of a fence across the way used by plaintiff, filling, and placing upon it stones, ties, gravel, and iron rails, so as to render it impassable as a horseway, and practically so as a footway. The statement finds that the acts done by defendant were done "in the construction and maintenance of its railroad, which it was authorized by law to construct and maintain." If the meaning of this is that the acts done by defendant were done as

a part of the necessary repair of its road, and were appropriate for that purpose, and that interference with plaintiff's way was necessarily incidental to such repair, there would be strong ground to argue that the plaintiff had and could acquire no right which interfered with this, and that such a right of the defendant was necessarily superior to any which plaintiff could have acquired. But an examination of the whole facts, taken in connection with the arguments submitted, leads us to the conclusion that the obstacle to the plaintiff's way was a permanent one; that its purpose was simply to deprive the plaintiff of the use of the way; and that it was in no other sense an act done in the maintenance of its road by the defendant.

We have not found it necessary to consider whether the plaintiff was entitled to a way by necessity. Judgment affirmed.

Crossing—Acquiring Easement by Prescription.—The mere passive or permissive use of a crossing not a public highway does not render the company liable because of its failure to provide safe guards, and give signals at and for such way (see Ill. Cent. R. Co. *v.* Godfrey, 71 Ill. 500; s. c., 22 Am. Rep. 112; Morrissey *v.* East. R. Co., 126 Mass. 377; s. c., 30 Am. Rep. 686; Nicholson *v.* Erie R. Co., 41 N. Y. 525), because a mere implied permission or license to enter or pass over the estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident. Ill. Cent. R. Co. *v.* Godfrey, 71 Ill. 500; s. c., 22 Am. Rep. 112; Hickey *v.* Boston & L. R. Co., 96 Mass. (16 Allen) 429; Sweeny *v.* Old Colony R. Co., 92 Mass. (10 Allen) 373; Gillis *v.* Pa. R. Co., 59 Pa. St. 129; Phila. & R. R. Co. *v.* Hummel, 44 Pa. St. 375; yet where a crossing has been commonly and notoriously used by the public for many years as a public crossing, and without let, or hindrance from the company, those who use it are not trespassers. Philadelphia & R. R. Co. *v.* Troutman (Pa.), 6 Am. & Eng. R. R. Cas. 117; and note, pp. 123, 126. Where a railroad company knowingly permits a place in a highway crossing to be used as a crossing by the general public for years, the public thereby acquires an easement in such crossing, and the company is bound to use reasonable care at such crossing and to give the statutory notice and warning of the approach of trains (Byrne *v.* N. Y. Cent. & H. R. R. Co., 104 N. Y. 362; s. c., 58 Am. Rep. 512; Barry *v.* N. Y. Cent. & H. R. R. Co., 92 N. Y. 289; s. c., 13 Am. & Eng. R. R. Cas. 615; 44 Am. Rep. 377); and exercise care similar to that required at a legally established public highway crossing. Harriman *v.* Pittsburgh, C. & St. L. R. Co., 45 Ohio St. 11; s. c., 32 Am. & Eng. R. R. Cas. 37; Kelly *v.* Southern Minn. R. Co., 28 Minn. 98; s. c., 6 Am. & Eng. R. R. Cas. 264; Taylor *v.* Delaware & H. Canal Co. 113 Pa. St. 162; s. c., 28 Am. & Eng. R. R. Cas. 656; 57 Am. Rep. 446.

It is thought, however, that to create an easement by prescription the conduct of the company must be such as to amount to an invitation, expressed or implied, to the public to use the crossing. Stewart *v.* Pennsylvania R. Co. (Ind.), 14 Am. & Eng. R. R. Cas. 679, note, 681.

Mere permission or license to cross the track is not necessarily an invitation (Wright *v.* Boston & A. R. Co., 142 Mass. 296; s. c., 28 Am. & Eng. R. R. Cas. 652), but the construction of the crossing and its character may be such as to constitute an invitation. Stewart *v.* Pa. R. Co. (Ind.), 14 Am. & Eng R. R. Cas. 679; Wright *v.* Boston & A. R. Co., 142 Mass. 296; s. c., 28 Am. & Eng. R. R. Cas. 652; Kelly *v.* Southern Minn. R. Co., 28

Minn. 98; s. c., 6 Am. & Eng. R. R. Cas. 264; Taylor *v.* Delaware & H. Canal Co. 113 Pa. St. 162; s. c., 28 Am. & Eng. R. R. Cas. 656; 57 Am. Rep. 446. Whether there is an invitation either expressed or implied is generally a question for the jury. Taylor *v.* Delaware & H. Canal Co. 113 Pa. St. 162; s. c., 28 Am. & Eng. R. R. Cas. 656; 57 Am. Rep. 446. See Fitchburgh R. Co. *v.* Page, 131 Mass. 391; s. c., 7 Am. & Eng R. R. Cas. 86.

Same—Highway by Dedication.—At the time of the construction of a railroad, there was a public highway running east and west at right angles to the line, and crossing the line close to the point where the company erected its depot. The road had from time to time been improved and repaired by the public authorities, and there was some evidence that soon after the railroad was built the public laid some planking at the crossing to facilitate travel. This planking was, however, soon taken up by the company which put down new plank crossing, which it maintained from that time at its own expense. The crossing, as laid, and the highway formed one continuous line. The road had been extensively travelled not only by the inhabitants of the immediate vicinity, but also by the general public of the neighboring districts; and the company never raised any objection to the use of the crossing. It was shown that such a crossing either there or at a point in the immediate vicinity, was necessary to accommodate business with the defendant company. The railroad company contended that the way had been constructed for its own use, and not for the benefit of the public; and that there had therefore been no dedication; but it was *held*, that the facts that the company had placed the crossing in a line with the highway on each side of the track, that the use of the crossings by the public was long permitted by the company without objection, and was not limited to those living in the immediate vicinity, but was common to the general public as a thoroughfare of extensive districts, and that a public crossing might reasonably have been expected to exist in the neighborhood, were sufficient to establish the dedicatian of the road, Skjeggerud *v.* Minneapolis & St. L. R. Co. (Minn.), 35 N. W. Rep. 572.

HANKS *v.* BOSTON AND ALBANY R. CO.

BEEMAN, Administrator, *v.* BOSTON AND ALBANY R. CO.

(*Massachusetts Supreme Judicial Court, October* 19, 1888.)

Personal Injuries—Crossing—Invitation to Public—License.—If a person attempted to cross the track of a railroad company merely by the license or permission of the company, and not under circumstances from which an inducement or invitation to persons having occasion to pass thereon, to treat the same as a highway and to use it for any lawful purpose, can be inferred, no recovery can be had for negligence causing the death of such person.

Same—Personal Injuries—Invitation to Cross Track—Private Premises.—A railroad company by the formation of a crossing may extend an invitation to persons to use such crossing for the purpose of access to the premises of others though not necessarily to any public way beyond.

Same—Province of Jury.—Where it is shown that a crossing 80 feet in length and 12 feet in width, extending over six railroad tracks, had been carefully planked and extended into the premises of a private firm, and that it was frequently travelled for the purpose of obtaining access to such premises, there is sufficient evidence to present for the determination of the jury the question whether such an inducement or invitation had been held out to the public to use the crossing for any lawful purpose as a person injured was entitled to avail himself of.

Same—Contributory Negligence—Want of Due Care.—The fact that a person was driving at a trot as he approached a track for the purpose of crossing it, and that he did not avail himself of an opportunity for a casual glance past certain cars for the purpose of ascertaining whether there was any train approaching, is not sufficient to charge such person with want of due care.

Same—Listening for Train.—The fact that a person injured while crossing a track was not affirmatively shown to have listened for a coming train is not sufficient to preclude a recovery, when there is evidence that witnesses standing in the immediate neighborhood heard no sound of an approaching train until the alarm whistle was sounded upon the engineer's discovering the danger of an accident, although the engineer may have testified that he rang the bell as he approached the crossing.

ON exception by defendant to judgments for the plaintiffs.

Actions to recover damages for the death of one Moses, a truckman, while driving across the track of the defendant company, and for injuries sustained by the plaintiff, Hanks (who accompanied him) through the negligence of the defendant company's servants. The defendant requested the court to rule that the plaintiff could not recover on the ground that it was not shown that defendant invited or induced Moses to go upon the crossing, and also on the ground that there was no evidence that Moses exercised due care. The defendant excepted upon the court's refusal so to do. Verdicts in all the cases were rendered for the plaintiffs.

Frank P. Goulding for defendant.

W. S. B. Hopkins and *Joshua E. Beeman* for plaintiffs.

DEVENS, J.—It will not be controverted that the defendant corporation might so conduct in regard to a grossing over its railroad as not merely to give a tacit license or assent to its use as a crossing by the public, but that the circumstances under which such use was permitted and enjoyed might also amount to an inducement or invitation to persons having occasion to pass thereon to treat the same as a highway, and to use it for any lawful purpose. Sweeny *v.* Old Colony & N. R. Co., 10 Allen, 368; Murphy *v.* Boston & A. R. Co., 133 Mass. 121; O'Connor *v.* Boston & L. R. Co., 135 Mass. 358. If Moses attempted to cross merely by license or permission of defendant, these actions cannot be maintained.

Conduct of company—Inducement to use crossing.

The first question is therefore whether, upon the evidence in

the case, the defendant had so held out the crossing as one to be used and enjoyed by the public that Moses may be said to have attempted, by its inducement or invitation, to use it.

There was evidence that the crossing, which was carefully planked, had been constructed by the defendant. It was 80 feet in length and 12 in width, extending over 6 railroad tracks, and led directly from the freight yard of defendant into the grounds of Whitney & Co. One Fisher, who had previously owned the land of the Whitneys, had possessed a right of way over defendant's railroad, but he had deceased at the time the way was thus prepared. It did not appear that at this time, or that of the injury, any person had any right of way over the railroad except such, if any, as might be derived from the license or the invitation of the defendant. Wheel tracks led from Brigham street, a town way lying southerly of defendant's premises and the crossing, which passed along the southerly side of a milk-shed, mill, and freight house of defendant, to the south end of the crossing, while other wheel tracks led from a point where Brigham street intersected Cottage street, another town way to the same place. These tracks extended through the open area which surrounded the buildings of defendant, which area was used as a mill and freight yard. The premises of the Whitneys lay on the northern side of the railroad, easterly and westerly of the crossing. They were unenclosed, but contained a box-factory, planing-mill, and lumber-yard. From them a way led over the premises of one T. H. Smith, easterly to Main street, between a straw shop and bakery belonging to Smith. This was a private way appurtenant to the Whitney estate, but used in common by it, by Smith, the owners or occupants of the straw shop and bakery, and others. This way was unenclosed, and from 1 to 2 rods in width as travelled, and there were other buildings than those described on the Smith estate.

Same—Facts.

There was evidence that teams, express wagons, and sometimes lighter carriages, to the number of from 10 to 25 a day, passed over the crossing, conveying lumber and other articles to and from the Whitneys' yard, flour to the bakery, coal, pasteboard, etc., to the straw shop, and bringing articles therefrom; also depositing rubbish behind the bakery and in the swamp beyond the Whitneys' land, and drawing wood therefrom in the winter. There was also evidence that people from out of town came that way by the crossing to the Whitneys' place; "that people in town would go both ways," and "that anyone who wanted to cross could do so when the road was clear;" and, in the language of one witness, "that express wagons, market wagons, coal teams, truck teams, wood and lumber teams,—all kinds of business teams and occasionally private teams,"—went

across there. Upon the part of defendant, it appears that the crossing was sometimes obstructed by cars kept on the track nearest the Whitneys', which were moved, however, when they requested.

Upon this evidence a case was presented to be decided by the jury, whether such an inducement or invitation had been held out to the public to use this crossing for any lawful purpose of which Moses was entitled to avail himself. In deciding this it was a circumstance to be considered, indeed, that the crossing could only be reached through the premises of the Whitneys or the defendant, but in connection with the method in which the latter had permitted its freight yard and the area around its buildings to be used and the tracks it had permitted to be there established. Nor was it decisive against the claim of the plaintiff that there was no evidence that, previous to the injury, any team had passed through the premises of the Whitneys and Smith from Brigham street to the Main street, or in the opposite direction in a continuous journey. In determining whether there was an inducement to travellers to avail themselves of a crossing, it has no doubt been held important in some cases that such crossing directly connected two parts of the same street. Sweeny *v.* Old Colony & N. R. Co., 10 Allen, 368; O'Connor *v.* Boston & L. R. Co., 135 Mass. 358. But as an invitation to enter premises may be established even when the traveller may not be invited to go beyond them, so there may be an invitation to cross them to the premises of others, but not necessarily to any public way beyond.

Same—Method of reaching crossing.

In holding that the evidence was sufficient to justify the sub mission of the case to the jury on this point, it is to be observed that it may have been materially aided by a view of the locality. Tully *v.* Fitchburg R. Co., 134 Mass. 499.

The defendant further contends that there was no evidence of due care on the part of Moses. As he approached the track while he was driving at a trot, there was nothing to show that this was an improper or dangerous pace. There is no evidence that he looked for a coming train, but as he approached the crossing his view was obscured by cars which were standing on the rails of the first track and easterly of the crossing. It appears, by one witness, that there is a point some 20 feet from the crossing and upon the roadway where a glance could have been obtained to the east between the box factory and the cars as they stood on the track. But it is impossible to say that because Moses is not shown to have availed himself of this opportunity for a casual glance, he was not in the exercise of due care. Williams *v.* Grealy, 112 Mass. 79. Nor was it affirmatively shown that Moses listened for

Plaintiff not negligent.

a coming train, but it was in evidence that witnesses, one of whom stood close by the office door, near which he passed, heard no sound of an approaching train until the alarm whistle was sounded upon the engineer's discovering him on the crossing. The engineer, indeed, testified that he rang the bell as he approached the crossing, but, as it was not heard by others, the jury may have believed there was some mistake about this. To some extent Moses had a right to rely on his expectation that the usual signals of warning of an approaching train would have been given. Chaffee *v.* Boston & L. R. Co., 104 Mass. 108.

Taking all the circumstances into consideration,—the pace at which Moses was travelling, the obstructions which intervened between himself and his sight to the east as he entered upon the crossing, and the fact that the sound of the approaching train was not heard by others,—it was for the jury to say whether he had exercised reasonable precaution in entering upon the crossing. That the conduct of Moses after he saw the train, considering his alarm and consequent confusion, was otherwise than that of a prudent man, was not seriously contended.

Exceptions overruled.

Crossing—Invitation to Public—License.—See, *ante*, Turner *v.* Fitchburg R. Co. 317, and note, 321.

In an action to recover damages for personal injuries sustained in consequence of a defective railroad-crossing, a complaint is bad which does not show with sufficient certainty that the defendant ever held out any invitation, express or implied, to cross at the crossing in question, which is not shown to have been part of a public highway. The averment that the defendant gave a license to the public to cross at that point is insufficient to render it liable. Stewart *v.* Pennsylvania R. Co. (Ind.), 14 Am. & Eng. R. R. Cas. 679.

Same—Contributory Negligence—Want of Due Care.—For a full and exhaustive discussion of the question of contributory negligence at railway-crossings, and a full collection of the authorities, see, *post*, Cleveland, C., C. & I. R. Co. *v.* Schneider, 334, and note, 345; also 4 Am. & Eng. Encyc. of L. 68–78 tit. CONTRIBUTORY NEGLIGENCE, 33.

Same—Listening for Trains.—It may be said to be well settled that it is the duty of every person about to cross the railroad track to stop, look, and listen when it would be possible for him to see or hear by so doing. Chicago & N. W. R. Co. *v.* Hatch, 79 Ill. 137; Illinois Cent. R. Co. *v.* Goddard, 72 Ill. 567; Chicago, R. I. & Pac. R. Co. *v.* Bell, 70 Ill. 102; St. Louis & S. E. R. Co. *v.* Mathias, 50 Ind. 65; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 359; Schæfert *v.* Chicago, M. & St. P. R. Co., 62 Iowa, 624; s. c., 14 Am. & Eng. R. R. Cas. 696; Benton *v.* Central R. Co. of Iowa, 42 Iowa, 192; Haines *v.* Illinois Cent. R. Co., 41 Iowa, 227; Union Pac. R. Co. *v.* Adams, 33 Kan. 427; s. c., 19 Am. & Eng. R. R. Cas. 376; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391; s. c., 19 Am. & Eng. R. R. Cas. 261; Wright *v.* Boston & M. R. Co., 129 Mass. 440; s. c., 2 Am. & Eng. R. R. Cas. 121; Allyn *v.* Boston & A. R. Co., 105 Mass. 77; Chaffee *v.* Boston & L. R. Corp., 104 Mass. 108, 116; Butterfield *v.* Western R. Corp., 92 Mass. (10 Allen) 532; Hinckley *v.* Cape Cod R. Co., 120

Mass. 257; Haas v. Grand Rapids & I. R. Co., 47 Mich. 401; s. c., 8 Am. & Eng. R. R. Cas. 268; Brown v. Milwaukee & St. P. R. Co., 22 Minn. 165; Zimmerman v. Hannibal & St. J. R. Co., 71 Mo. 476; s. c., 2 Am. & Eng. R. R. Cas. 191; Berry v. Pennsylvania R. Co., 48 N. J. L. (19 Vr.) 141; s. c., 26 Am. & Eng. R. R. Cas. 396; Pennsylvania R. Co. v. Righter, 42 N. J. L. (13 Vr.) 180; s. c., 2 Am. & Eng. R. R. Cas. 220; Kellogg v. New York Cent. & H. R. R. Co., 79 N. Y. 72; Weber v. New York Cent. & H. R. R. Co., 67 N. Y. 587; Cordell v. New York Cent. & H. R. R. Co., 64 N. Y. 535; s. c., 70 N. Y. 119; McGrath v. New York Cent. & H. R. R. Co., 59 N. Y. 468; s. c., 17 Am. Rep. 359; Gorton v. Erie R. Co., 45 N. Y. 660; Harty v. Central R. Co. of N. J., 42 N. Y. 468; Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358; Wilds v. Hudson R. R. Co., 24 N. Y. 430; Mitchell v. New York C. & H. R. R. Co., 2 Hun (N. Y.), 535; Reading & C. R. Co. v. Ritchie, 102 Pa. St. 425; s. c., 19 Am. & Eng. R. R. Cas. 267; Philadelphia & R. R. Co. v. Boyer, 97 Pa. St. 91; s. c., 2 Am. & Eng. R. R. Cas. 172; Pennsylvania R. Co. v. Fortney, 90 Pa. St. 323; s. c., 1 Am. & Eng. R. R. Cas. 128; Pennsylvania R. Co. v. Beale, 73 Pa. St. 504; s. c., 13 Am. Rep. 753; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; s. c., 88 Am. Dec. 482; Ormsbee v. Boston & P. R. Corp., 14 R. I. 102; s. c., 51 Am. Dec. 354; Schofield v. Chicago, M. & St. P. R. Co., 114 U. S. 615; bk. 24, L. ed. 224; s. c., 19 Am. & Eng. R. R. Cas. 353; 2 McCr. C. C. 268; Chicago, R. I. & St. P. R. Co. v. Houston, 95 U. S. (5 Otto) 697; bk. 24, L. ed. 542; Stapley v. London, B. & S. C. R. Co., L. R. 1 Ex. 21; Skelton v. London & N. W. R. Co., 2 C. P. 631. See Southern & N. A. R. Co. v. Thompson, 62 Ala. 494; Gothard v. Alabama G. S. R. Co., 67 Ala. 115; Peoria & P. U. R. Co. v. Clayberg, 107 Ill. 644; Pennsylvania R. Co. v. Rudel, 100 Ill. 603; Chicago & N. W. R. Co. v. Dimick, 96 Ill. 42; s. c., 2 Am. & Eng. R. R. Cas. 201; Rockford, R. I. & St. L. R. Co. v. Byam, 80 Ill. 528; Chicago, R. I. & P. R. Co. v. Bell, 70 Ill. 102; Pittsburgh, C. & St. L. R. Co. v. Martin, 82 Ind. 476; Terre Haute & I. R. Co. v. Clark, 73 Ind. 168; s. c., 7 Am. & Eng. R. R. Cas. 84; St. Louis & E. R. Co. v. Mathias, 50 Ind. 65; Funston v. Chicago, R. I. & P. R. Co., 61 Iowa, 452; Laverenz v. Chicago, R. I. & P. R. Co., 56 Iowa, 689; Tully v. Fitchburg R. Co., 134 Mass. 499; s. c., 14 Am. & Eng. R. R. Cas. 682; New Orleans, J. & G. N. R. Co. v. Mitchell, 52 Miss. 808; Powell v. Missouri P. R. Co., 76 Mo. 80; Henze v. St. Louis, K. C. & P. R. Co., 71 Mo. 636; Fletcher v. Atlantic & P. R. Co., 64 Mo. 484; Wendell v. New York Cent. & H. R. R. Co., 91 N. Y. 420; s. c., 14 Am. & Eng. R. R. Cas. 663; Stackus v. New York Cent. & H. R. R. Co., 79 N. Y. 464; Havens v. Erie R. Co., 41 N. Y. 296; Baltimore & O. R. Co. v. Whitacre, 35 Ohio St. 627; Pennsylvania Co. v. Rathgeb, 32 Ohio St. 66; Baughman v. Chenango & A. R. Co., 92 Pa. St. 335; s. c., 6 Am. & Eng. R. R. Cas. 51; s. c., 37 Am. Rep. 690; Bohan v. Milwaukee, L. S. & W. R. Co., 58 Wis. 30; s. c., 15 Am. & Eng. R. R. Cas. 374. Some of the cases hold that ordinary prudence requires that, where one enters upon so dangerous a place as a railroad-crossing, he should use his senses,—should look and listen or take some precaution for the purpose of ascertaining whether he may cross in safety. It is said that those cases where the look-and-listen rule has been dispensed with are exceptions to the general rule falling in one of three classes—first, where the view of the track is obstructed, and hence where the injured party, not being able to see, is obliged to act upon his judgment at the time; in other words, where compliance with the rule would be impracticable or unavailing.—Webb v. Portland & K. R. Co., 57 Me. 117; Craig v. New York, N. H. & H. R. Co., 118 Mass. 431; Com. v. Fitchburg R. Co., 92 Mass. (10 Allen) 189; Johnson v. Hudson R. R. Co., 20 N. Y. 66; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; Continental Improvement Co. v. Stead, 95 U. S. (5 Otto) 161; bk. 24, L. ed. 403; Fordham v. London, B. & S. C. R. Co., L. R. 3 C. P.

368; Stubley *v.* London & N. W. R. Co., L. R. 1 Exch. 13; Dublin, W. & W. R. Co. *v.* Slattery, 3 App. Cas. 1155; s. c., 24 Eng. Rep. 713;—second, where the injured person was a passenger going to or alighting from a train, and hence under an implied invitation and assurance by the company to cross the track in safety,—Wheelock *v.* Boston & A. R. Co., 105 Mass. 203; Mayo *v.* Boston & M. R. Co., 104 Mass. 137; Chaffee *v.* Boston & L. R. Co., 104 Mass. 108; Gaynor *v.* Old Colony & N. R. Co., 100 Mass. 208; Brassell *v.* New York & H. R. R. Co., 84 N. Y. 241; s. c., 3 Am. & Eng. R. R. Cas. 380; Stapley *v.* London B. & S. C. R. Co., L. R., 1 Exch. 21;—third, where the direct act of some agent of the company had put the person off his guard and induced him to cross the track without precaution,—Warren *v.* Fitchburg R. Co., 90 Mass. (8 Allen) 227; Ormsbee *v.* Boston & P. R. Co., 14 R. I. 102; s. c., 51 Am. Rep. 354. See Patterson Ry. Acc. Law, 170.

Whether a person about to cross a track should stop, as well as look and listen, depends upon the circumstances of each particular case. Pennsylvania Co. *v.* Rudel, 100 Ill. 603; s. c., 6 Am. & Eng. R. R. Cas. 30; Pittsburgh, C. & St. L. R. Co. *v.* Wright, 80 Ind. 236; Laverenz *v.* Chicago, R. I. & P. R. Co., 56 Iowa, 689; s. c., 6 Am. & Eng. R. R. Cas. 274; Plummer *v.* Eastern R. Co. 73 Me. 591; s. c., 6 Am. & Eng. R. R. Cas. 165; Howard *v.* St. Paul, M. & M. R. Co., 32 Minn. 214; s. c., 19 Am. & Eng. R. R. Cas. 283; Kelly *v.* St. Paul, M. & M. R. Co., 29 Minn. 1; s. c., 6 Am. & Eng. R. R. Cas. 93; Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103; s. c., 2 Am. & Eng. R. R. Cas. 185; Kellogg *v.* New York Cent. & H. R. R. Co., 79 N. Y. 72; Houston & T. Cent. R. Co. *v.* Waller, 56 Tex. 331; s. c., 8 Am. & Eng. R. R. Cas. 431; Duffy *v.* Chicago & N. W. R. Co., 32 Wis. 275.

See also, as to duty to stop, look, and listen at crossings, Wichita & W. R. Co. *v.* Davis, 32 Am. & Eng. R. R. Cas. 65, note 70; Matti *v.* Chicago, etc., R. Co., Ib. 71; Lehigh & W. B. Coal Co. *v.* Lear, 32 Ib. 74; Chicago, etc., R. Co. *v.* Hutchinson, 32 Ib. 82; Gugenheim *v.* Lake Shore, etc., R. Co., 32 Ib. 89; Norfolk & W. R. Co. *v.* Burgé, 32 Ib. 101; Marty *v.* Chicago, etc., R. Co., 32 Ib. 107; Seefeld *v.* Chicago, etc., R. Co., 32 Ib. 109; New York, etc., R. Co. *v.* Kellams, 32 Ib. 114; Young *v.* New York, etc., R. Co., 32 Ib. 130; Woodward *v.* New York L. E. & W. R. Co., 32 Ib. 137; Durbin *v.* Oregon, etc., R. Co., 32 Ib. 149, note 154.

Same—Injuries at Crossing—Duty of Company.—In Pierce *v.* Humphreys, 34 Fed. Rep. 282, the plaintiff was injured while travelling upon the way which led from an elevator, in the city of Detroit. Brown, J., said: "The road upon which the accident occurred, though within the yard of the defendants, was a well-recognized way from the elevator to Woodbridge Street, laid out, cindered and planked, and in constant use by teams going to and from the elevator. If not originally designated and laid out by the railroad company, it had been done with the consent of its officers, and they were accustomed to open their trains at the crossing of this road, so as to leave a free and unobstructed entrance to the elevator. At the time the accident occurred, the track next to the one on which the plaintiff was injured was occupied by a line of freight-cars which had been opened at the crossing of the road just wide enough for teams to pass. The view toward the station from which the locomotive started was concealed, or at least obstructed, by this line of cars. Under these circumstances, I do not think that plaintiff can be considered as a trespasser in making use of this road. Delaney *v.* Railway Co., 33 Wis. 67. The defendants were bound to the exercise of ordinary care and prudence to make their premises safe for the use of teams. Elliott *v.* Pray, 92 Mass. (10 Allen) 378: Bennet *v.* Louisville & N. R. Co., 102 U. S. (12 Otto) 577, 585; bk. 26, L. ed. 235; Railroad Co. *v.* Stout, 84 U. S. (17 Wall.) 657; bk. 21, L. ed. 745."

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS R. CO.

v.

WYNANT.

(*Indiana Supreme Court, May* 15, 1888.)

Negligence—Crossing—Horses Taking Fright—Evidence.—Where the plaintiff sues to recover damages for injuries sustained through his horses taking fright at a box car standing partially upon a public highway, testimony that other horses had taken fright at the same car is inadmissible.

Same—Liability of Company.—If a car at which plaintiff's horses took fright was placed by defendant at a point upon its track which did not obstruct a highway crossing, and was afterwards moved on to the highway by persons for whom the defendant was not responsible, the company is not liable to plaintiff for injuries sustained unless it negligently permitted the car to remain upon the highway an unreasonable length of time.

APPEAL from Circuit Court, Madison County.

Action to recover damages for personal injuries. The opinion states the case.

H. H. Poppleton and *Robinson & Lovett* for appellant.

H. D. Thompson for appellee.

MITCHELL, C.J.—Action by Harriet Wynant against the appellant railway company to recover damages for injuries alleged to have been suffered by the plaintiff from the overturning of her carriage, the horses having taken fright at a box car, which, it is charged, the company unlawfully and negligently permitted to be and remain partially in and upon a public highway over which the plaintiff was travelling. The case was considered once before by this court, and reversed because the evidence did not sustain the verdict of the jury. 100 Ind. 160. A second trial has been had, with the result that judgment has again been rendered for the plaintiff. The case is before us a second time upon the same pleadings, and, according to the insistance of appellant's counsel, upon substantially the same evidence. Waiving any observations concerning the sufficiency of the evidence, or whether it is in any essential respect variant from what it was before, it is enough to say the judgment must be reversed for errors hereinafter pointed out. To sustain her case, the plaintiff gave evidence tending to show that certain empty, and, for the time being, unused, freight cars, which had been stored on a short railway

Facts.

track which diverged from the company's main line to a gravel pit, had been permitted to encroach from five to eight feet on either side of a public highway, over which the above-mentioned track lay, leaving a space of from 15 to 25 feet in width of the travelled way between the projecting cars. There was evidence tending to show that the plaintiff and her husband were passing over the highway in a vehicle drawn by two gentle horses. When about to go upon the railway track, between the cars, without having previously shown any sign of fear the horses suddenly took fright, and became unmanageable. Whether they were frightened at an empty car, or at noise which proceeded from it, is immaterial to the questions to be decided. There was some evidence tending to show that a box car had encroached upon the road for several days prior to the accident. The railway company introduced evidence tending to show that the car had been let down on the highway on the day of the accident by the unauthorized interference of some boys with the brakes. The car was an ordinary empty box car, such as is in common use on all railroads. At the trial the plaintiff produced witnesses who testified that they had passed over the highway in question several days prior to that on which the accident happened, and after describing the situation of the cars as they then observed them, and the manner in which they then projected into the highway, they were permitted to testify, over objection, that their horses took fright or "shied" at the cars. Nothing appeared concerning the disposition of the horses driven by the several witnesses in respect to whether or not they were ordinarily gentle and well disposed, or whether they were under careful guidance, and so the evidence might have been excluded on that account. But, if these objections had been obviated, we can discover no sound principle which justified the admission of the evidence. The principal facts in dispute under the issues were, whether or not the railway company had unlawfully or negligently or unreasonably permitted its empty car to remain placed upon a public highway, thereby causing the horses attached to the carriage in which the plaintiff was seated to take fright and run away, resulting in an injury for which she was in no way blameable. The evidence admitted pertained to facts altogether aside from those in dispute, and in no way tended to raise a legal presumption as to the disputed facts. It could have had no other effect than to mislead the jury, and distract their attention from the real issues in the case. There is no fixed rule governing the frightening of horses. An object that may render one unmanageable from fear, another may pass without notice. It does not follow, because one or more may have taken fright at a given object in a highway, that the ob-

Evidence of other horses taking fright.

ject was necessarily frightful to all gentle horses, nor does proof that a number of horses took fright at an object raise a legal presumption that another horse, on a different occasion, became frightened at the same object. Piollit *v.* Simmers, 106 Pa. St. 95; Railway Co. *v.* Glasscott, 4 Colo. 270; Newsom *v.* Railroad, 62 Ga. 339; Durbrow *v.* McDonald, 5 Bosw. 130; Wentworth *v.* Smith, 44 N. H. 419. The railway company was not bound to anticipate and make preparation to meet testimony of the character of that in question, nor would it have been heard to prove in rebuttal that other gentle horses had passed between the cars without taking fright, or that the horses which took fright were vicious and unsafe under ordinary circumstances. Bauer *v.* City of Indianapolis, 99 Ind. 56; Kidder *v.* Dunstable, 11 Gray, 342; Temperance Hall *v.* Giles, 33 N. J. Law, 260. Thus, in the case first above cited, it was held, in a suit against a city for an injury received in consequence of an obstruction upon a sidewalk, that it was not proper to admit evidence to show that others had passed over the same obstruction without injury. Where it becomes necessary to affect those charged with the duty of keeping highways, bridges, or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or unfitness, or where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose, or for practical use, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place, in the other. Railway Co. v. Ruby, 38 Ind. 294; Railroad Co. *v.* Newell, 104 Ind. 264; s. c., 23 Am. & Eng. R. R. Cas. 492; City of Delphi *v.* Lowery, 74 Ind. 520; City of Fort Wayne *v.* Coombs, 107 Ind. 75; s. c., 13 Am. & Eng. Corp. Cas. 469; Railway Co. *v.* Wright, 16 N. E. Rep. 142 (present term).

The present case does not come within the rule above stated. None of the occurrences described were of such a character as to convey notice to the railway company, or to be known to any others than the witnesses themselves. Evidence of other similar occurrences on other occasions is not admissible for the purpose of raising a presumption that the particular accident in question happened, or that the place was defective and dangerous, or that the situation was of such a character that the occurrence resulting in the injury complained of might well have taken place. The facts are the only legitimate evidence of the injury and of the manner and cause of the occurrence. Ramsey *v.* Road Co., 81 Ind. 394; Collins *v.* Inhabitants of Dorchester, 9 Cush. 396; Hubbard *v.* City of Concord, 35 N. H. 52; Maguire *v.* Railroad Co., 115 Mass. 239; Hawks *v.* Inhabitants

of Charlemont, 110 Mass. 110; Blair *v.* Pelham, 118 Mass. 420. The case is parallel in principle with Hudson *v.* Railway Co., 59 Iowa, 581. In that case the plaintiff claimed damages for injuries occasioned to his horse, resulting from defective planking at a railway-crossing. The judgment of the lower court was reversed because a witness was permitted to testify that, some time prior to the injury complained of, a horse driven by him had got his foot between the plank and rail at the same place where the plaintiff's horse was injured. We are aware of the fact that some contrariety exists in the decisions upon the point in question. In our opinion, the rule above indicated is the one justified by the decisions of this court, and altogether the safer one upon principle. Patt. R. Acc. Law, 420. There is in the present case no open, visible connection between the evidentiary facts or independent occurrences out of which it is assumed certain presumptions arise and the facts sought to be established by deduction from the evidentiary facts proved. This, the law requires. The jury must not be left to decide the principal facts by making remote inferences from facts having no visible connection with those in dispute. U. S. *v.* Ross, 92 U. S. 281. The only presumptions of fact which the law recognizes are those which arise or may be inferred immediately from the facts proved. Manning *v.* Insurance Co., 100 U. S. 693; Douglass *v.* Mitchell, 35 Pa. St. 440. It must have been assumed, because some other horse frightened at the car, that it was necessarily an object calculated to frighten gentle horses, and therefore that those drawing the plaintiff's carriage became frightened at it. The conclusion was not a natural deduction from, nor had it any visible or probable connection with, the facts. McAleer *v.* McMurray, 58 Pa. St. 126. It might be proved that horses of ordinary gentleness took fright at a newspaper or other object casually left in a public highway; but it would hardly be contended that proof might be heard to show that a newspaper was an object naturally calculated to frighten horses of ordinary gentleness. It is well settled that one who negligently, or without right, places an object, naturally calculated to frighten horses of ordinary gentleness, within the limits of a public highway, or who wrongfully suffers such an object, although placed there without fault, to remain an unreasonable length of time, may become liable for an injury occasioned by the fright of horses thereat. Town of Rushville *v.* Adams, 107 Ind. 475; s. c., 15 Am. & Eng. Corp. Cas. 259; Turner *v.* Buchanan, 82 Ind. 147; Piollit *v.* Simmers, *supra*. Such an object wrongfully placed or unreasonably kept or maintained in a public highway, may become a nuisance, for which the author may incur liability to a person suffering special injury therefrom.

Frightening horses—Liability of company.

As to what objects may lawfully be placed within the limits of a public highway, and as to what may constitute a reasonable time during which such objects may be kept there, must depend upon the circumstances of each particular case. Horses may take fright at wheelbarrows, road-engines, covered wagons, box-cars, reaping-machines, building materials, and an indefinite number of other things which are not nuisances *per se* when found within the limits of a public highway; and yet all these may become nuisances by being negligently permitted to obstruct a highway, depending upon the circumstances of each case. Horses of ordinary gentleness become accustomed to such objects when the objects are found in their customary places. They are more liable to become alarmed when they encounter such an object in an unusual place or under extraordinary circumstances. This is part of the common knowledge possessed by all intelligent persons of mature years. All horses are disposed to scare or shy at objects of an unusual character in a highway. Roads are prepared with referenee to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit. These are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject to be pleaded and proved, whether a box-car or any other particular object is naturally calculated to frighten horses. This is to be determined by the experience, observation, and intelligence of the court and jury, as applied to all the facts of the particular case before them. Gilbert *v.* Railway Co., 51 Mich. 488; s. c., 15 Am. & Eng. R. R. Cas. 491; Railway Co. *v.* Farver, 111 Ind. 195. The mere fact that an object is in the highway, in violation of a statute, does not necessarily make the owner liable for damages resulting from fright which the object may have occasioned to horses. There must have been some natural, causative connection between the violation of the statute and the frightening of the horses. The object in the situation in which it was left must have had a necessary or natural tendency to that end, according to common experience. A cow or a sheep may be upon a public highway in violation of a statute, and a horse of ordinary gentleness may take fright at such an animal. The frightening of horses was not, however, the mischief which the statute requiring certain animals to be restrained from running at large was intended to prevent. The injury must in each case be proximately such as was within the purpose and protection of the statute. Railway Co. *v.* Locke, 112 Ind. 404. It was error to admit the evidence.

At the proper time the defendant company asked the court to instruct the jury to the effect that the railway company had the right to have its cars standing on its branch road at any

point except in or upon the highway, and that if the car, at which the plaintiff's horses took fright, was placed by it at a point so as not to obstruct the highway, and was afterwards moved into the highway by persons for whom the company was not responsible, that the company would not be liable to the plaintiff for the injury suffered by her unless it negligently permitted the car to remain upon the highway an unreasonable length of time. This was undoubtedly a correct statement of the law, and it was applicable to the defence which the defendant sought to maintain by its evidence. It is the right of a party applying for it, to have his theory of the case clearly and distinctly presented to the jury when he has adduced evidence fairly tending to support it. Tenbrooke *v.* Jahke, 77 Pa. St. 392; Railway Co. *v.* Krichbaum, 24 Ohio St. 119; Comstock *v.* Norton, 36 Mich. 279; Thornt. Jur. § 165. The instruction given by the court, although correct in the abstract, were general. The defendant had a right to an instructions adapted to the special features of the defence which it undertook to support by its evidence. Parkhill *v.* Town of Brighton, 61 Iowa, 103; Parmlee *v.* Adolph, 28 Ohio St. 10; Railroad Co. *v.* Picksley, 24 Ohio St. 654.

For the foregoing reasons, the judgment is reversed, with costs, with instructions to the court to sustain the appellant's motion for a new trial.

Crossing—Horses Taking Fright at Cars.—A railroad company is liable for negligently placing objects on or near a public highway, naturally calculated to frighten horses. But it is not negligence in a railroad company, in reference to one driving upon a highway, to leave a car standing over night upon the track near, but not upon, a highway crossing, provided it was not so near the highway as to frighten an ordinarily quiet and gentle horse. Kyne *v.* Wilmington & Northern R. Co. (Del.), 14 Atl. Rep. 922. See, generally, as to frightening horses at crossings, Rosenberger *v.* Grand Trunk R. Co., 15 Ib. 448; Johnson *v.* St. Paul, etc., R. Co., 15 Ib. 467; Gilbert *v.* Flint, etc., R. Co., 15 Ib. 491; Grand Trunk, etc. R. Co. *v.* Rosenberger, 19 Ib. 8; Ranson *v.* Chicago, etc., R. Co., 19 Ib. 16; Young *v.* Detroit, etc., R. Co., 19 Ib. 417; Wasmer *v.* Delaware, etc., R. Co., 1 Ib. 122; Billman *v.* Indiana, etc., R. Co., 6 Ib. 41; Louisville, etc., R. Co. *v.* Schmidt, 8 Ib. 248; Strong *v.* Placerville, etc., R. Co., 8 Ib. 273; Myers *v.* Richmond & D. R. Co., 8 Ib. 293; Bussian *v.* Milwaukee R. Co., 10 Ib. 716.

Same—Travelling over Partially Obstructed Crossing.—A traveller is not guilty of negligence in attempting to pass over a highway-crossing that is partially obstructed, provided the obstruction is such that a man of ordinary intelligence would reasonably believe that, with proper care and caution, he could pass in safety. If there was another road near by which he might use, ordinary prudence might require him to resort to it; but if there was none, he might be justified in attempting to use the defective one. And evidence of the fact that the obstructed road is the only way in the neighborhood is admissible as bearing upon the question whether he exercised proper care and caution in attempting to cross. Skjeggerud *v.* Minneapolis & St. L. R. Co. (Minn.), 35 N. W. Rep. 572.

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS R. CO.

v.

SCHNEIDER.

(*Ohio Supreme Court, May* 1, 1888.)

Negligence—Accidents at Crossings — Switching — Flagman.—Where a railroad company uses the tracks of its road across a generally travelled public street in a populous town or city, for its convenience in the switching of trains, cars, and locomotives, and the crossing is thereby rendered exceptionally dangerous, it is bound to exercise care proportioned to the increased danger arising from such use of its tracks, to avoid injury to persons using the crossing, and should, in the exercise of such care, as a reasonable precaution for their safety, and means of preserving the legitimate uses of the street, maintain flagmen, or gates and gatemen, at such crossing, or adopt other equally adequate measures for that purpose.

Same—Gatemen — Agreement for Running Powers—Liability.—A railroad company which, in operating the road with the company owning the same, under an agreement to pay the latter a specified sum yearly, in excess of the amount to which it is entitled out of the joint earnings, for the use of its tracks and the cost of switching, uses the tracks at such crossing, where gates and gatemen are maintained, is bound to the same care in the use thereof as the company owning the road, and should anticipate the reasonable effect of the gates, and the gatemen's conduct in their management, on persons approaching the crossing, or about to cross, and operate the road at that place having due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under these circumstances. And if, while so using the tracks of the road, it accepts the services of the gatemen employed by the company owning the road, instead of employing gatemen of its own, they become, for the time being, its servants, for whose negligence it is responsible; and, if it does not accept their services, its duty is to place competent gatemen at such crossing, and is responsible for its omission to do so.

Same — Open Gate — Contributory Negligence. — When gatemen are maintained at such crossings, it is their duty to observe the tracks, and know when, on account of trains or engines thereon, it becomes dangerous for persons to cross, and, when it is so, to close the gates, and keep them closed, to prevent persons from going upon the tracks, so long as the danger continues; and when the tracks are clear, or persons may cross without danger from passing cars and locomotives, then to open the gates, and keep them open, to enable persons to cross, so long as it is safe for them to do so, but no longer. Persons approaching the crossing, or about to cross, have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties; and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from a disregard by the gatemen of their duties. Hence an open gate, with the gateman in charge, is notice of a clear track and safe crossing; and, in the absence of

other circumstances, when the gates are open, and the gate-men present, it is not negligence in persons approaching the crossing with teams to drive at a trot, or pass onto the tracks through the open gates without stopping to listen, though the view of the tracks on either side of the crossing is obstructed; nor, in such case, is their failure, when at a distance of 25 feet from the track, to look for locomotives 150 feet or more from the crossing, negligence, though they could have been seen.

ERROR to Circuit Court, Hamilton County.

On the 10th of September, 1881, Henry Schneider, while driving his team over the railroad tracks across Freeman Street, in the city of Cincinnati, was killed by a locomotive run, managed, and operated by the Cleveland, Columbus, Cincinnati & Indianapolis R. Co. His widow, Mary Schneider, was appointed administratrix of his estate, and brought her action in the superior court of Cincinnati against the railway company, under the statute, for damages, averring that his death was caused by the negligence and wrongful conduct of the company's servants, and that he was without fault. The answer controverted all the allegations of the petition except that the defendant is a corporation under the laws of Ohio. The plaintiff obtained a verdict for $6000, but, upon the hearing of a motion for a new trial filed by the defendant, consented to remit $2000, and accept judgment for $4000. The motion was thereupon overruled, and judgment entered accordingly. A bill of exceptions was duly taken, purporting to set out all the evidence, the charge of the court to the jury, certain instructions requested by the defendant which were refused, and certain other instructions requested by the defendant which were given. One of the grounds of the motion for a new trial was misconduct on the part of the plaintiff in the action, upon which affidavits were read by both parties, which affidavits are by reference made part of a separate bill of exceptions taken on the overruling of the motion. The railway company prosecuted error to the district court, and at the April term, 1885, the circuit court affirmed the judgment of the superior court, and the reversal of these judgments is now sought in this court. The errors relied on relate to the charge of the court, its refusal to give in charge the instructions requested, and misconduct of the plaintiff in the progress of the trial. Such further statement with reference to them as is deemed material will appear in the opinion.

Matthews, Holding & Grieve, and *E. H. Pendleton* for plaintiff in error.

Campbell & Bettman for defendant in error.

WILLIAMS, J.—The refusal of the court to give in charge to the jury the first instruction requested by the railway company

is made the basis of an extended argument to show that it was denied the benefit of the proper rule of law on the subject of contributory negligence. Whether this is so depends not only upon the accuracy of the instruction requested, but also upon the effect of the charge given. The charge requested is as follows: "(1) It was the duty of the decedent to approach the crossing at such a rate of speed as would enable him to stop promptly, to avoid danger; and if the decedent approached the crossing on a trot, or at such rate of speed as prevented him from discovering the danger in time to avoid it, or prevented him from stopping promptly, or from turning his horses, or as induced him to hurry across, upon discovering the danger, rather than attempt to stop, then he was guilty of contributory negligence, and the plaintiff cannot recover even though defendant's negligence also contributed to the injury." The court, in its general charge on the subject, said to the jury: "The deceased was bound to use the same care, in protecting himself, that the defendant company was bound to use in seeing that no person came to injury by the management of its cars and engines; that is, he was bound to use such care and prudence as a reasonable and prudent man would use in protecting himself against an injury. It was his duty to use his senses, in approaching the railway track, to discover whether or not there was any train or locomotive approaching which might injure him; to make such reasonable use of his eyes and other senses as a reasonable and prudent man would make; and if, by the use of them, he could have avoided the injury, then he cannot recover from the company. But if he exercised such care as a reasonable, prudent man would exercise, and if the defendants was guilty of neglect in the running of this engine, and the deceased was killed by reason of that, then the company is responsible." And, at the request of the company, the court further instructed the jury "that it was the duty of the deceased, in approaching the railroad crossing, to look for the railroad locomotive before attempting to cross; and, if his failure contributed to the accident, he cannot recover, even though the defendant's negligence also contributed to the injury. Even though the fireman and engineer were guilty of neglect contributing to the injury, yet that did not absolve the deceased from exercising the precaution of looking and listening for the approach of trains at such point on Freeman street as would enable him to discover the approaching train or locomotive, or from approaching the crossing at such gait as would enable him to control his horses promptly." The instructions given to the jury omitted nothing of substance contained in the one refused, unless it be that, "if the deceased approached the crossing on a trot," he was guilty of contribu-

Instructions given and refused.

tory negligence. Indeed, the effect of the charge requested is that it is negligence in law for a person driving a team to approach at a trot a railroad crossing under any circumstances. It is undoubtedly true that persons approaching railroad crossings are bound to the reasonable and prudent exercise of their faculties to discover danger, and to the use of proper care to avoid injury; and, if the omission of either contributes to their injury, they are generally without remedy. But whether they have so exercised their faculties, and used such care, must depend upon the particular circumstance. For instance, it has been held that the absence of the usual sign-board of warning is a circumstance which may properly go to a jury to enable them to determine whether the person attempting to cross the railroad track has been guilty of such negligence as would defeat his recovery. The reason assigned is "that, if the traveller is a stranger to the crossing, the want of such warning would be calculated to mislead him into danger; and, if he was familiar with the crossing, it might operate as a reminder of danger which he might otherwise forget." And, generally, "when the question of contributory negligence depends upon a variety of circumstances, from which different minds may arrive at different conclusions as to whether the plaintiff exercised proper care and caution, the question should be submitted to the jury under proper instructions." Railroad *v.* Whitacre, 35 Ohio St. 627. Approaching a railroad crossing by one driving a team at the speed of a trot may not necessarily either interfere with the prudent use of his faculties, or prevent due care on his part in crossing. There may be crossings much used both by the railroad company and the travelling public where it would be highly important that the persons should cross over promptly and quickly. At the intersection of railroads and highways where trains are run at long intervals, and few persons travel the road, persons approaching ordinarily can tell whether it is dangerous to cross, and easily govern their own conduct in crossing. But where several tracks, over which trains and engines are run many times every hour, cross a constantly travelled public street in a populous city, thronged with people and vehicles, unless some expeditious mode of crossing were devised, a confused and hopeless obstruction of the street would result. Hence, at such crossings gates are put up and gate-men maintained by railroad companies, as was the case at the crossing in question, as a means of safety to the people using the street, and for the protection of the railroad companies. It is the business of the gate-men to watch the track, and, when clear, to open the gates for persons using the street to cross; and, upon the approach of locomotives or trains, to close the gates, and prevent persons and vehicles from crossing until the

Contributory negligence—Open gates.

tracks are again clear. To persons in the street who are approaching the railroad tracks with a view to crossing, an open gate is notice that the track is clear, and that it is safe to cross; but, as the gates were liable to be closed at any time, persons crossing would naturally understand they should not linger on the track, but pass over promptly and speedily. Therefore, for a person to drive on a trot onto the railroad tracks while the gates are open, instead of being negligence, might be a high degree of care. The evidence in this case very clearly shows that Freeman street, at the point it was crossed by the railroad tracks, was a public street of the city of Cincinnati, over which people and teams of all kinds were constantly passing; that several tracks of the railroad were laid across it, which were by two companies used for shifting their cars and locomotives, and gates had been put up, and gate-men were maintained at the crossing; that, at the time the deceased approached and drove onto the crossing, the gates were open, and he drove onto the tracks through the open gate on a trot, and we think the court properly left it to the jury to determine whether the deceased, under the circumstances of the case, used such care as a reasonable and prudent person would and ought; and the refusal of the court to charge the jury that he was guilty of contributory negligence, if he approached the crosssing on a trot, was not error.

2. It is next contended that there was error in refusing to instruct the jury that, "If the jury find that the gateman was an employee of the Cincinnati, Hamilton & Dayton R. Co., and under its control, and operated the gates while the trains of the defendant were passing simply as the servant of the first-named company, then the defendant could be charged with his negligence unless, after discovering his negligence, it could, by the exercise of ordinary care, have prevented the effect of such negligence;" and in the charge given on that subject, which is as follows: "There is one thing further which is to be said about the question as to the agents of the defendant. It is claimed that the defendant is not liable for the acts of the brakeman, gate-keeper, and perhaps other employees because they were employees of the Cincinnati, Hamilton & Dayton R. Co., and not the employees of the defendant company. If you find, from the testimony, that the defendant, the Cleveland, Columbus, Cincinnati & Indianapolis R. Co., was occupying the tracks of the Cincinnati, Hamilton & Dayton R. Co. by an agreement between the two companies; that the engine which caused the injury was the engine of the defendant company; and that the switchmen, gatekeepers, train-despatchers, and other officers and agents of the Cincinnati, Hamilton & Dayton Co. were, by reason of this agreement, engaged in

Liability for negligence of gateman of another company.

running, or aiding to run, the locomotive of the defendant company,—then, for the purposes of the movements of that locomotive on the track of the Cincinnati, Hamilton & Dayton Co., the officers and agents of the Cincinnati, Hamilton & Dayton Co. engaged in that work were the officers and agents of the Cleveland, Columbus, Cincinnati & Indianapolis R. Co." It appears from the record that a contract was made between the Cincinnati, Hamilton & Dayton R. Co. and the Cleveland, Columbus, Cincinnati & Indianapolis R. Co., in 1876, the seventh section of which only was put in evidence, and which reads as follows: "Seventh. The business of said two lines of railroad shall be conducted so as to preserve the existing relations of each with eastern and western connecting roads, and to develop to the fullest extent the business resources of each line; all passenger trains shall be run to and from the Cincinnati depot, party of the first part, and for the use of the same, with the tracks, side tracks thereto, and yards for passenger-cars west of Mill Creek; and, for the cost of switching, the party of the first part shall be allowed and paid, by the party of the second part, in excess of the amount to which each shall be entitled out of the joint earnings, annually, the sum of five thousand dollars, payable monthly." There was evidence tending to show that the gate at the Freeman-street crossing was put up by the former company, and that the gateman was employed by that company, but the engines and trains of the latter company were run and controlled by its own servants and employees; and that the engine which collided with the wagon of the deceased, when he was killed, was so run and controlled; and, as the negligence charged against the defendant by the plaintiff, in her petition, consisted in carelessly running the locomotive and managing the crossing, it became a material question whether the defendant could be made responsible for any negligence of the gateman, while it was using and operating the railroad. The whole of the agreement between the two companies is not produced; and it was impossible for the court, from the fragment that was introduced in evidence, to construe it, or properly determine its effect, or the relation really existing between the companies. From that part of the contract contained in the record, it appears that each company had the right to the equal and joint use of the tracks and depot, and the defendant was to pay the other company, for the use of the same, with the side tracks and yard, and for the cost of switching, $5000 per year in excess of the amount to which it should be entitled out of the joint earnings. What the arrangement was in regard to the servants or employees of the two companies is not shown. Whether they were to be paid out of the joint earnings, and be under the joint control, of the two companies,

or otherwise, does not appear from that part of the agreement in the record; and the evidence on the subject consisted of the usage and conduct of the companies. It would seem, therefore, that the court properly left it to the jury to determine, as a question of fact, whether the defendant was using the tracks of the other company under an agreement with it, and the gatekeeper and other employees of the company were, by reason of the agreement, aiding to run the locomotives of the defendant which caused the injury. If so, they became, by virtue of the agreement, the servants and employees of the defendant, and it became liable for their negligence. The fact that the gateman was an employee of the Cincinnati, Hamilton & Dayton R. Co., and was under its control, and so operated the gates while the defendant's trains were passing, does not exclude the idea that, by virtue of the agreement between the two companies, he may also have been then equally under the control of the defendant. But we do not care to rest the decision of this question solely or mainly upon the foregoing considerations. It is generally held that railroad companies, unless required by statute, are not bound to place gates or flagmen at highway-crossings except under special circumstances which render the precaution necessary for the public safety. The duty, it is said, does not arise merely from the number of persons who use the crossing, but it may be created by an exceptionally dangerous mode of crossing adopted by the companies for their own convenience. Pierce R. R. 352, and cases cited. "A railway company is not, as a rule, in the absence of a statute requiring it, or of an ordinance of a municipal corporation, bound to maintain gates at a crossing or keep a flagman to warn travellers of the approach of trains; but, under the maxim, *sic utere tuo*, etc., instances may arise where the duty is cast upon them, or of providing some other equally safe mode, by reason of the location of the crossing and the large number of people crossing it, or where the mode of crossing adopted by the company is exceptionally dangerous." 2 Wood Ry. Law, 1313. And in Railroad Co. *v.* Matthews, 36 N. J. Law, 531, the chief justice, in delivering the opinion of the court, said: "Under usual circumstances, in the open country they [railway companies] can run as many trains, and at as great rate of speed, as are consistent with the safety of their passengers. They are not called on to keep flagmen, under ordinary circumstances, at cross roads, nor give any other notice of the approach of their trains than those signals that are prescribed by statute. If greater safeguards are requisite for the safety of the community, and those public agents are to be put under greater restrictions in the exercise of their franchises, such contrtvances must proceed from the legislative, and not from the judicial, power. But, while I thus say that

these additional burdens cannot be imposed by the courts upon these companies, I also say, at the same time, and with quite as much emphasis, that the companies may, by their own conduct, impose such burdens on themselves. If one of them chose to build its tracks in such a mode as to necessarily make the use of a public road which it crosses greatly dangerous, I think such company, by its own action, must be held to have assumed the obligation of compensating the public for the increased danger by the use of additional safeguards. The reasonable and indispensable implication is that the railway is to be constructed so as not unnecessarily to interfere with the safe use of the public road; and if a railroad, for its own convenience, curves its track, as it leaves a deep cut within a few feet of a highway, and also sees fit to put up buildings close along such track, and by these means, or either of them, heightening the danger in the use of such highway, it seems to me very clear that such company must be held to have taken upon itself the duty of averting such danger by the employment of every reasonable precaution within its power. On such occasions as this, or whenever the situation is embraced within the principle stated, the presence of a flagman, or some equivalent safeguard, can be demanded of the company." The crossing in question has been recognized by the railroad companies using it as of that exceptionally dangerous character, made so for their convenience in using the tracks as a place for switching cars and locomotives, which created the duty to place gates and gatemen there as a necessaay precaution on their part, and we think very properly so; for when a railroad company, for its own convenience, lays its tracks across a generally travelled public street in a populous town or city, over which people, with their teams and vehicles, are accustomed to pass almost continuously, and then uses the tracks as a place for the convenient switching of trains and engines, thus making a yard of a portion of the public street, it is bound to exercise care, proportioned to the increased danger arising from such use of its track, to avoid injury to persons using the crossing. And common prudence requires that it should, as a reasonable precaution for their safety, and means of preserving the legitimate uses of the street, maintain flagmen, or gates and gatemen, at such crossing, or adopt other adequate measures for that purpose; otherwise, the street may be permanently obstructed, and its uses destroyed. So long as the defendant used the railroad tracks at this crossing, and operated the road, it was incumbent on it to use like care. It should anticipate the reasonable effect of the gates, and the gatemen's conduct in their management, on persons approaching the crossing, or about to cross, and operate the road at that place having due regard to such probable effect, and exercise care proportioned to the probable dan-

ger to persons using such crossing under those circumstances; and if, while so using the tracks of the road, it accepts the services of the gatemen employed by the company owning the road, instead of employing gatemen of its own, they become, for the time being, its servants, for whose negligence it is responsible; and, if it does not accept their services, its duty is to place competent gatemen there, and is responsible for its omission to do so. It might, by proper stipulation in the agreement of the railroad company with which it contracted, require it to furnish competent servants for the transaction of its business, and hold it responsible for any breach of the agreement; but it cannot, by such contract or by its failure to so contract, shift either the duty it owes to those using the street, or its responsibility to them.

Failure to discover train as contributory negligence.

3. The refusal of the court to give the third instruction requested by the defendant is also one of the errors assigned. That instruction is that, "If the jury find, from the evidence that, at a point on Freeman street twenty-five feet from the track upon which the locomotive that caused the injury was coming, the decedent, seated in his wagon, could, by looking in the direction of the approaching locomotive, have seen it at a distance of one hundred and fifty feet or more from the crossing, and in time to avoid the collision, his failure to discover its approach was negligence on his part, and the plaintiff cannot recover." It is said in the argument that this instruction is adopted from Railway Co. *v.* Snyder, 24 Ohio St. 678. The instructions requested and refused in that case were that, if the plaintiff's daughter, who was killed, and her sister, who was accompanying her, could, by looking, have seen the train, and avoided the injury, their attempt to cross without looking was negligence; or, if they were standing on the track without looking to see if a train were approaching, if they could have seen the danger and avoided the injury by looking, that was negligence. This court, in declining to reverse the judgment because of the refusal to give the instructions, said: "While we think the court erred in refusing a new trial on the ground that the verdict is against the weight of the evidence, we see no error in its refusal to give the instructions asked. To give the instructions asked would have been, to a great extent, taking the case from the jury by assuming the existence of material facts in the case. The court could not say to the jury that the failure of the girls to look in the direction of the gravel-train when approaching or standing upon the track was carelessness such as should prevent a recovery, without assuming the existence of material facts in the case, which it was for the jury to find. The instructions asked assume the agency of the elder sister, and assume the non-existence of any

facts or circumstances rendering it prudent or proper for her to omit looking out. These were matters for the jury, and could not be fonnd or assumed by the court, no matter how plainly they might be proven." These observations apply aptly to the instruction now under discussion. It assumes that there were no other facts or circumstances in the case which might properly enter into the question of contributory negligence, and in effect excluded from the jury, in its consideration of the question, the fact that gates were maintained at the crossing, and stood open in the presence of the gateman having control, thus signifying a clear track, and amounting to an invitation, to those about to cross over, to do so. Then, there was evidence tending to prove that there were at least four tracks crossing Freeman street at the point in question, used by both railroad companies for switching and shifting locomotives and cars. These tracks intersected at different places, so that the passing of engines along them in the direction of the crossing, and 150 feet away, was not always an indication that they would pass the crossing; and the fact that the gate remained open might easily create the belief, by persons ordinarily prudent, that they would not be run to the crossing. At least, this was a proper circumstance for the jury in determining whether the deceased exercised proper care; and the instruction requested virtually excluded it from their consideration, and we think there was no error in refusing it.

4. The only other instruction requested by the defendant which was refused is the following: "If there were obstructions to the decedent's line of vision in the direction from which the locomotive was coming, that fact made it the more necessary that he should use other means to discover danger; and, if he could not avoid danger otherwise than by stopping and listening, then it was his duty, before going upon the track, to stop and listen; and, if his failure to do so contributed to the injury, plaintiff cannot recover." Much of what has already been said, is also applicable to the question raised by this request. As before remarked, persons approaching railroad-crossings are bound to the reasonable use of their faculties in discovering and avoiding danger from passing trains; and to that end it is ordinarily their duty to listen, and, if necessary, stop, before attempting to cross; but, at crossings where gates are maintained, this may cease to be a duty, or be so only under peculiar circumstances, though the view of the track is obstructed. The placing of gates and gatemen at the crossing may have become but a prudent and proper precaution on the part of the railroad companies because of the obstructed view of the tracks and the difficulty on the part of persons approaching in discovering

Obstructed view—Duty to stop and listen.

danger from observation merely. At such crossings, it is the duty of the gatemen to observe the tracks, and to know when, on account of approaching trains and engines, it becomes dangerous to cross, and, whenever it does, to close the gates, and prevent persons from attempting it; and it is as much their duty to observe and know when the tracks are clear and persons may cross over in safety, and, when it is, to open the gates, and keep them open for that purpose so long as it continues to be safe to cross, and no longer. Persons approaching such crossings have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duty, and govern themselves accordingly; and hence, when the gates are open and the gatemen present, they are entitled to assume that the tracks are clear and it is safe to cross. And their failure to stop and listen before passing onto the tracks through the open gate is not, in the absence of other circumstances, negligence which will, in case of injury to them caused by a passing locomotive while so attempting to cross, defeat a recovery therefor. This conclusion is sustained by the case of Baker *v.* Pendergast, 32 Ohio St. 494, where it is held that "A person about to cross a street of a city in which there is an ordinance against fast driving has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons." It is true that it is further held in that case "that, if the person crossing the street knew that persons were driving along the street at a forbidden speed, and had full means of seeing the rate at which they were going, the existence of the ordinance would not authorize a presumption which was negatived by the evidence of his senses." The instruction, requested by the defendant, now under consideration assumes that the deceased (Schneider) did not see the approaching engine, and could not on account of obstructions to his "line of vision in the direction from which the locomotive was coming," and therefore that it was his duty to use other means to discover the danger, and, if necessary, to stop and listen. In the case assnmed by the instruction, the presumption upon which he had a right to rely—viz., that the gatemen were properly performing their duty and the track was clear—was not negatived by the evidence of his senses, or in any other way.

5. The last assignment of error we notice is that based upon the alleged misconduct of the plaintiff. It appears from the bill of exceptions that a drawing, prepared by one of the witnesses, of an engine, and the crossing, was admitted in evidence

on the trial, and was taken with the papers by the jury on the submission of the case. The misconduct consisted in writing on the back of this paper by one of the plaintiff's counsel what is characterized by defendant's counsel as "points and suggestions." If not entirely unintelligible, they are so meagre and obscure as to render it doubtful whether any person except the one who wrote them could make any intelligent interpretation of them, or derive any significance from them. It appears that they were *memoranda* written while the counsel for the defendant were making their arguments to the jury, by one of the plaintiff's counsel, as points to be answered by him in the closing argument. He did not at the time know that they were being made on a paper in the case, and it appears that they were not made with any intention to have them go to the jury, and neither the plaintiff nor her counsel knew the jury had them. The delivery of the paper to the jury was attended by no wrongful conduct on the part of the plaintiff or of her attorneys; and the trial court, familiar with the progress of the trial and the conduct of the jury, was better able than we to judge whether the defendant could have been prejudiced thereby. At all events, we do not regard it a matter of such consequence as to require the reversal of the judgment.

Misconduct of counsel—Writing on papers.

Some other errors are assigned, but they are substantially disposed of by what has already been said, and they need not be more particularly noticed. Judgment affirmed.

Crossing—Necessity of Flagman—Statutory Requirements.—An Illinois statute requires railroad companies upon receiving notice from the public authorities that a flagman is necessary at a crossing, to place and retain a flagman there. But the mere fact that the duty is imposed upon the company to keep a flagman upon the crossing, upon so receiving notice, does not relieve it from the duty of placing one there of its own motion, if the necessities of the crossing require it, and evidence that no flagman had been stationed at the crossing is admissible notwithstanding the provisions of the statute for the purpose of proving negligence. Chicago, Baltimore & Quincy R. Co. *v.* Perkins, (Ill.) 17 N. East Rep. 1.

See, generally, as to duty of company to post flagman at crossing, Tugenheim *v.* Lake Shore, etc., R. Co., 32 Am. & Eng. R. R. Cas. 89, and cases cited in note, p. 100.

Same—Pleading—Instruction.—A petition in an action to recover damages for injuries sustained at a highway crossing stated that, "the defendant, without giving any proper warning or signal of the approach of its train, and without keeping a flagman at said crossing to give warning and notice to persons passing upon said street, and to signal danger when trains were approaching or crossing said street, as it was required by an ordinance duly passed," etc. In the instructions of the court, it withdrew from the jury the question as to defendant's negligence arising from the fact that it had no flagman at the crossing because no ordinance had been introduced in evidence; but the court submitted to the jury the question whether ordinary care and prudence did not require the defendant to keep

a flagman at the crossing to warn persons crossing over it irrespective of any municipal regulations. It was held that the petition was broad enough to admit of the instruction given. Schmidt *v.* Burlington, C. R. & N. R. Co. (Iowa), 39 N. W. Rep. 916.

Same—Contributory Negligence.—See, *ante*, Cleveland, C. C. & I. R. Co. *v.* Wynant, 328, and note, 333.

OMAHA, NIOBRARA AND BLACK HILLS R. CO.

v.

O'DONNELL.

(*Nebraska Supreme Court, November* 23, 1887.)

Crossings—Statutory Signals—Negligence.—The failure of servants of a railroad company to give the statutory signals at a crossing, when running at a high rate of speed, and not upon the regular time for the train, is to be considered in deciding whether such company was guilty of negligence, and whether a person injured at the crossing used due care in attempting to cross.

Same—Contributory Negligence—Question of Fact.—The question as to whether a person injured by a passing train at a railroad-crossing was guilty of negligence in attempting to cross is usually a question of fact to be decided upon all the circumstances of the case as shown by the evidence.

ERROR from District Court, Platte County.

Action for damages for personal injuries. The opinion states the case.

A. J. Poppleton, J. S. Shropshire, and *W. R. Kelly* for plaintiff.

McAllister Bros. for defendant.

REESE, J.—This action was instituted in the district court of Platte county, for damages sustained by plaintiff, resulting from personal injury and the destruction of his team, harness, and wagon at a railroad-crossing at the town of St. Edwards, on the line of the railroad of plaintiff in error. The cause was tried to a jury, who returned a verdict in favor of defendant in error for $5500. This verdict was set aside by the district court and a new trial granted. On the second trial, a verdict was returned in favor of defendant in error for $5000. A motion for a new trial was filed, assigning two grounds therefor—first, "the verdict is not sustained by the evidence, and is contrary to law; second, for errors of law occurring at the trial and duly excepted to by defendant." This motion was overruled and judgment rendered on the verdict.

Facts.

Plaintiff in error brings the cause into this court by proceedings in error. Defendant in error alleges error in the action of the district court in setting aside the first verdict, and asks that that order be set aside, and judgment rendered thereon.

It is conceded that the first verdict was set aside for the sole reason that the evidence was not sufficient to sustain it, and that the evidence upon that trial was substantially the same as on the last. We do not think it necessary to enter into a discussion of the testimony adduced upon the first trial, for the reason that the result of the second one was substantially the same, and for the further reason that it could not be said that there was an abuse of discretion in the action of the court. To this may be added the further reason that it is apparent that the last verdict was sufficiently large to cover the damage proven on either trial. The sole question presented by this record is as to whether the verdict is sustained by the evidence.

The testimony upon the trial shows substantially the following uncontroverted facts: Plaintiff's railroad is constructed through the village of St. Edwards upon a straight line and a level surface. Defendant resides about one half mile north of the village and on the east side of the railroad track, the direction of which is from southeast to northwest, and perhaps about one half mile from the track. That part of the village in which the post-office, stores, etc., are situated, is on the west side of the track, or across the same from the residence of defendant in error. The crossing is at the section line on the north boundary of the village, and about one half mile southwest from defendant's house. On the day on which the accident occurred, defendant in error was in the village, with his team and wagon, and at about 7 o'clock in the evening started to go home. The point from which he started was about four blocks northwest of the depot and perhaps about the distance of one block from the track of plaintiff's road. His first direction was one and a half blocks west, thence four blocks north, which again brought him near the track parallel with the track to the northwest along the right of way for about 180 yards to the section-line crossing, where, by a short turn to the right, he sought to cross the railroad track. As he was in the act of crossing the track, plaintiff's train, coming from the southeast, struck his team and wagon, killing both horses, breaking the wagon and harness, and injuring him. The regular time for the train was 5:30 o'clock. It was therefore about one and a half hours late. Of this fact defendant in error had knowledge, for he had seen the train standing near the depot, about three quarters of a mile southeast from the place of the accident, some little time before he started home; but he testifies that he had been informed, by what he considered reliable authority, that the train had gone before he

started. His informant, however, was in no way connected with the railroad. It was quite cold and the wind was blowing strongly from the northwest. There was but one train per day running each way, the return train going south in the morning.

In the examination of the question presented,—the contributory negligence of defendant in error,—it must not be forgotten that all questions of fact were for the jury to determine, and that, where the testimony was conflicting, it was for them to decide as to which of the witnesses were entitled to belief. In addition to the foregoing statement of facts, there was sufficient evidence to support the finding that the train was running at an unusually high rate of speed, and that no signals were given of its approach to the crossing; that, when defendant in error approached the track, before turning parallel with it, he looked along the track and saw no train, and that he again looked when about half way from there to the crossing, with the same results; that the road upon which he was driving was very rough and frozen hard, so that he could not, or did not, hear the approach of the train as it came up in his rear, no other noise being made by it than the exhaust of steam, and that caused by the running of the train, neither bell nor whistle being used, and that he had no knowledge of its presence until he was on the track and saw it not more than 50 feet away, bearing down upon him at what some of the witnesses testified to be double its usual rate of speed. There is no question as to the fact of the accident. One of the horses was thrown upon the right, the other to the left, side of the engine. The wagon was thrown from the track with great force, and the sound of the collision was heard a half-mile away; yet the engineer testified that he neither saw nor heard anything of the accident, and knew nothing of it until the next day.

If it be true that the train was running at the rate of speed described by the witnesses, through the village, and that no signal of any kind was given, the train being one hour and a half later than its usual and regular time, these facts would be proper to be considered by the jury in ascertaining whether the employees of plaintiff in error were negligent or not, the law requiring the signals to be given. Comp. St. 1885, p. 203, § 104. Upon the other hand, if the jury found that defendant in error had sufficient reason to believe the train had gone, that when he approached the railroad track he looked down the track and saw no train, and that this was repeated before trying to cross, with the same result, and that under all the circumstances he exercised that degree of care usually exercised by and required of reasonably prudent men, they would be justified in finding that he was guilty of no such negligence as would defeat his

Failure to give signals—Contributory negligence.

recovery. These questions of negligence were for the jury to decide; and we cannot conceive how, as matter of law, it can be said either that plaintiff in error was not, nor that defendant in error was, negligent. The first duty was upon plaintiff in error; a part of this was the compliance with a plain mandatory statute. Defendant in error had the right to expect this duty to be observed in case a train should pass at that time—not that a failure to perform it would exonerate any fault of his, nor release him from the exercise of proper care, but that he might have the opportunity of knowing of the approach of the train. It is true that plaintiff in error had the right to expect due care of any one who might be near its track, with a design to cross, but that would not justify it in running at the reckless rate of speed described by the witnesses, against a high wind and in violation of law. The degree of care required of a person who is about to cross a railroad track is such care as could be reasonably expected of an ordinarily prudent person under like circumstances; and this was a question for the jury to determine under all the circumstances of the case. This case seems to us to be peculiarly within the rule stated by the supreme court of the United States, in Railroad Co. *v.* Stout, 17 Wall. 657, and approved in Railroad Co. *v.* Bailey, 11 Neb. 332; 9 N. W. Rep. 50, and in City of Lincoln *v.* Gillilan, 18 Neb. 115; 24 N. W. Rep. 444. See also, upon this part of the case, Railway Co. *v.* Hutchinson, 11 N. E. Rep. 855; Railroad Co. *v.* Rudel, 100 Ill. 603; Railroad Co. *v.* Troutman, 6 Am. & Eng. R. R. Cas. 117; Smedis *v.* Railroad Co., 88 N. Y. 13; s. c., 8 Am. & Eng. R. R. Cas. 445; Railway Co. *v.* McLin, 82 Ind. 435, 452; s. c., 8 Am. & Eng. R. R. Cas. 237; Sherry *v.* Railroad Co., 10 N. E. Rep. 128. The verdict cannot therefore be molested as not being sustained by the evidence.

Objection is made to instruction numbered 10, given to the jury by the trial court; but, as the question of its correctness was not presented to that court in the motion for a new trial, it cannot be considered here. Schreckengast *v.* Ealy, 16 Neb. 510; Railroad Co. *v.* Walker, 17 Neb. 432.

The judgment of the district court is affirmed.

The other judges concur.

Injury at Crossing—Contributory Negligence.—See, *ante*, Hanks *v.* Boston & A. R. Co. 321, and note, 325-327.

Duty to Give Warning Signals.—*At common law*, it is the duty of a railroad company to give reasonable and proper warnings, for the protection of travellers on a highway, when its trains are approaching a highway crossing. See Peoria & P. U. R. Co. *v.* Clayberg, 107 Ill. 644; s. c., 15 Am. & Eng. R. R. Cas. 356; Rockford, R. I. & St. L. R. Co. *v.* Hilmer, 72 Ill. 240; Chicago & A. R. Co. *v.* Gretzner, 46 Ill. 84; Chicago, B. & Q. R. Co. *v.* Cauffman, 38 Ill. 428; Chicago, R. I. R. Co. *v.* Still, 19 Ill. 499; s. c., 71 Am. Dec. 236; Galena & C. U. R. Co. *v.* Loomis, 13 Ill. 548;

s. c., 56 Am. Dec. 471; Lynfield *v.* Old Colony R. Co., 64 Mass. (10 Cush.) 562; s. c., 57 Am. Dec. 124; Loucks *v.* Chicago, M. & St. P. R. Co., 31 Minn. 526; s. c., 19 Am. & Eng. R. R. Cas. 305; Philadelphia & T. R. Co. *v.* Hagen, 47 Pa. St. 244; s. c., 86 Am. Dec. 541; Wakefield *v.* Connecticut & P. R. Co., 37 Vt. 330; s. c., 86 Am. Dec. 711. A traveller has the right to presume that such warning will be given. Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Loucks *v.* Chicago, M. & St. P. R. Co., 31 Minn. 526; s. c., 19 Am. & Eng. R. R. Cas. 305; Ernst *v.* Hudson R. R. Co., 35 N. Y. 9; s. c., 90 Am. Dec. 761; Beisiegel *v.* N. Y. Cent. R. Co., 34 N. Y. 622; s. c., 90 Am. Dec. 741; Klanowski *v.* Grand Trunk R. Co., 57 Mich. 525. The right of the companies' trains to proceed at the crossing does not relieve it of the duty to give warning signals of its approach. Indianapolis & V. R. Co. *v.* McLin, 82 Ind. 435; s. c., 8 Am. & Eng. R. R. Cas. 237. See also Rockford, R. I. & St. L. R. Co. *v.* Hilmer, 72 Ill. 240. These are merely the requirements of ordinary care. Peoria & P. U. R. Co. *v.* Clayberg, 107 Ill. 644; s. c., 15 Am. & Eng. R. R. Cas. 356; Guggenheim *v.* Lake Shore & M. S. R. Co., 57 Mich. 488; s. c., 22 Am. & Eng. R. R. Cas. 546; Kelly *v.* St. Paul, M. & M. R. Co., 29 Minn. 1; s. c., 6 Am. & Eng. R. R. Cas. 93; Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103; s. c., 2 Am. & Eng. R. R. Cas. 185; Tallman *v.* Syracuse, B. & N. Y. R. Co., 98 N. Y. 198. And failure to give them is negligence. See Rauch *v.* Lloyd, 31 Pa. St. 358; s. c., 72 Am. Dec. 747; Murray *v.* South Carolina R. Co., 10 Rich. (S. C.) L. 227; s. c., 70 Am. Dec. 219; Milwaukee & C. R. Co. *v.* Hunter, 11 Wis. 160; s. c., 78 Am. Dec. 699.

Same—Character of Warning.—The warning given must be of such a character, and made at such time, that it will serve to protect the traveller from injury at the crossing if he be in the exercise of original care. Chicago, & R. I. R. Co. *v.* Still, 19 Ill. 499; s. c., 71 Am. Dec. 236; Louisville, C. & L. R. Co. *v.* Goetz, 79 Ky. 442; s. c., 14 Am. & Eng. R. R. Cas. 427. The question as to the sufficiency of notice, while sometimes a question of law for the court,—Loucks *v.* Chicago, M. & St. P. R. Co., 31 Minn. 526; s. c., 19 Am. & Eng. R. R. Cas. 305, 309. See Louisville & N. R. Co. *v.* Com., 13 Bush (Ky.), 388; Philadelphia, W. & B. R. Co. *v.* Stinger, 78 Pa. St. 219, 225, 227; Roberts *v.* Chicago & N. W. R. Co., 35 Wis. 779;—is generally a question for the jury,—Loucks *v.* Chicago, M. & St. P. R. Co., 31 Minn. 526; s. c., 19 Am. & Eng. R. R. Cas. 305, 309; Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103; s. c., 2 Am. & Eng. R. R. Cas. 185.

Same—Where Required.—The common law, however, does not absolutely require warning signals to be given at all highway-crossings approached by its railway trains,—see Spencer *v.* Illinois Cent. R. Co., 29 Iowa, 55; Brown *v.* Milwaukee & St. P. R. Co., 22 Minn. 165;—the duty, so far as signals are concerned, being simply the duty to operate the road with due regard to the right and safety of the public,—Illinois Cent. R. Co. *v.* Ebert, 74 Ill. 399; Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103; s. c., 2 Am. & Eng. R. R. Cas. 185; Bell *v.* Hannibal & St. J. R. Co., 72 Mo. 50; Harlan *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 22; Paine *v.* Grand Trunk R. Co., 58 N. H. 611; Grippen *v.* New York Cent. R. Co., 40 N. Y. 34; Beisiegel *v.* N. Y. Cent. R. Co., 40 N. Y. 9; Pennsylvania R. Co. *v.* Barnett, 59 Pa. St. 259. If the giving of warning signals at any particular crossing are necessary in order to constitute due care on the part of the railroad company when its trains are approaching such crossings, an omission to give such signals is negligence at common law. See Peoria & P. N. R. Co. *v.* Clayberg, 107 Ill. 644; s. c., 15 Am. & Eng. R. R. Cas. 356; Rockford, R. I. & St. L. R. Co. *v.* Hilmer, 72 Ill. 240; Chicago, R. I. R. Co. *v.* Still, 19 Ill. 499; s. c., 71 Am. Dec. 236; Pennsylvania R. Co. *v.* Krick, 47 Ind. 368; Loucks *v.* Chicago, M. & St. P.

R. Co., 31 Minn. 526; s. c., 19 Am. & Eng. R. R. Cas. 305; Dyer *v.* Erie R. Co., 71 N. Y. 228.

Whether Such Signals are Necessary is a Question of Fact for the jury. See Favor *v.* Boston & L. R. Co., 114 Mass. 352; Norton *v.* Eastern R. Co., 113 Mass. 369; Linfield *v.* Old Colony R. Co., 90 Mass. (10 Cush.) 562; s. c., 57 Am. Dec. 124; Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 115; Cordell *v.* New York Cent. & H. R. R. Co., 64 N. Y. 535. See, however, Herring *v.* Wilmington & R. R. Co., 10 Ired. (N. C.) L. 402; s. c., 51 Am. Dec. 395; Biles *v.* Holmes, 11 Ired. (N. C.) L. 16; Brock *v.* King, 3 Jones (N. C.) L. 47.

Statutory Signals.—Regarding statutory provisions for the giving of warning signals by trains approaching a highway-crossing, see the following cases in these series: Wabash, St. L. & Pac. R. Co. *v.* Wallace, 110, Ill. 114; s. c., 19 Am. & Eng. R. R. Cas. 359, 361; Cincinnati, Hamilton & Ind. R. Co. *v.* Butler, 103 Ind. 31; s. c., 23 Am. & Eng. R. R. Cas. 262; Pennsylvania R. Co. *v.* Weddle, 100 Ind. 138; s. c., 26 Am. & Eng. R. R. Cas. 162; Johnson *v.* Misscuri Pac. R. Co., 18 Neb. 690; s. c., 23 Am. & Eng. R. R. Cas. 429; Texas & Pac. R. Co. *v.* Wright, 62 Tex. 515; s. c., 23 Am. & Eng. R. R. Cas. 304; Wakelin *v.* London & S. W. R. Co., L. R. 12 H. L. 41; s. c., 29 Am. & Eng. R. R. Cas. 425, 440.

A failure to give the statutory signals is in some States a *prima facie* negligence *per se*,—Mo. Act. 1881, p. 79; amended, Mo. Rev. Stat. 1879, § 806);—but the general rule is, it must not only be shown that the statutory signals were omitted, but also that the omission was the proximate cause of the injury,—see Chicago, B. & Q. R. Co. *v.* Harwood, 90 Ill. 425; Toledo, W. & W. R. Co. *v.* Jones, 76 Ill. 311; Parker *v.* Wilmington & N. R. Co., 86 N. C. 221; s. c., 8 Am. & Eng. R. R. Cas. 420; Pakalinsky *v.* New York Cent. & H. R. R. Co., 82 N. Y. 424; s. c., 2 Am. & Eng. R. R. Cas. 251. In such case, the railway company may show, as a defence, that such failure was not the proximate cause of the injury,—Huckshold *v.* St. Louis I. M. R. Co., 90 Mo. 548; s. c., 28 Am. & Eng. R. R. Co., 659, because mere negligence, followed by an accident, will not render the company liable in those cases where such negligence did not cause the accident,—see Atchison, T. & S. F. R. Co. *v.* Morgan, 31 Kan. 77; s. c., 13 Am. & Eng. R. R. Cas., 499, and note, pp. 502, 503; Stepp *v.* Chicago, R. I. & P. R. Co., 85 Mo. 229; Harlan *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 22; Karle *v.* K. C., St. J. & C. B. R. Co., 55 Mo. 476. See 4 Am. & Eng. Encyl. L., tit. CROSSINGS, 18, pp. 921, 924 for a full discussion of this subject.

See also Chicago, etc., R. Co. *v.* Dillon, 32 Am. & Eng. R. R. Cas. 1, and note on "Effect of Failure to Give Statutory Signals at Crossings," p. 6.

The statutory requirement that the bell of a locomotive should be rung or the whistle blown for a specified distance at crossings imposes the duty upon a railroad company, not only in reference to persons approaching or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subject to injury by the passing train. Wakefield *v.* Conn. & P. R. R. Co., 37 Vt. 330; s. c., 86 Am. Dec. 711. And a railroad company which neglects reasonable precaution to prevent collision at highway-crossings is not exempt from liability for injury resulting therefrom, merely by showing that it complied with the statutory requirements as to ringing the bell, sounding the whistle, and the like. Eaton *v.* Fitchburg R. Co., 129 Mass. 364; Favor *v.* Boston & L. R. Corp., 114 Mass. 350; Norton *v.* Eastern R. Co., 113 Mass. 366; Commonwealth *v.* Boston, & W. R. Co., 101 Mass. 201. Whether or not all reasonable precautions have been adopted, is a question for the jury. Favor *v.* Boston & L. R. Corp., 114 Mass. 352; Norton *v.* Eastern R. Co., 113 Mass. 366.

ATCHISON, TOPEKA AND SANTA FE R. CO.

v.

TOWNSEND.

(*Kansas Supreme Court, April 7, 1888.*)

Highway Crossing—Signals—Negligence.—It is negligence *per se* for the railroad to fail to sound the whistle 80 rods from a public crossing, but it does not excuse a traveller from using care and caution to avoid injury at such crossing.

Same—Duty to Look and Listen.—It is the duty of one about to cross a railroad crossing to look and listen for an approaching train; and, if the view of the track is limited and partially obstructed, greater care is required on the part of a traveller than would be if he had an open and extended view of the same.

ERROR to District Court, Jefferson County.

Action for damages for personal injuries. The opinion states the case.

Geo. R. Peck, A. A. Hurd, and *Henry Keeler* for plaintiff in error.

Thos. P. Fenlon and *L. A. Myers* for defendant in error.

HOLT, C.—On the 21st of February, 1885, the defendant in error drove from Valley Falls to his home, about two miles north-east of that city. He was compelled to cross the track of the defendant's railroad twice, and at the crossing nearest his home the locomotive of a passing passenger train of the defendant struck the rear end of the wagon in which he was riding, and he was thrown out, and his foot injured. He brought this action against the company for the injury sustained. It was tried at the February term, 1886, of the Jefferson district court, and he recovered judgment for $3500. The company bring the case here. The only errors complained of that we care to notice are—First, the admission of irrelevant testimony; and, second, whether the plaintiff was guilty of contributory negligence. A witness for defendant, J. B. Kelly, in his direct examination, testified that he was the fireman on the train that ran into plaintiff's wagon at the crossing; that for the last 26 months his run had been between Topeka and Atchison, and that on the day the accident occurred the whistle was sounded three times at the whistling post, 80 rods west of the crossing. Upon cross-examination he testified: "During all the time I worked as fireman on that train, the whistle of the en-

Case stated.

gine on which I worked was regularly sounded for the crossing, and the engineer never failed to sound his whistle for the crossing." Over the objection of the defendant, other witnesses were allowed, in rebuttal, to testify that, at other times than upon the day when the accident occurred, the whistle was not sounded for the crossing in question. Defendant contends that such evidence was irrelevant and immaterial; and as it tended only to contradict the witness on a fact which was collateral and irrelevant, and about a matter that was drawn out by the plaintiff himself upon cross-examination, it was error for the court to admit it. We are of the opinion that the contention of the defendant is correct. This testimony did not tend to establish any issue in the case. The witness had testified about the sounding of the whistle upon nearing this crossing that day. In the cross-examination by plaintiff he gave evidence concerning the blowing of the whistle at other times; that it was the invariable habit of the engineer to sound the whistle at all crossings. Such testimony would not be proper cross-examination ordinarily; in this instance, for the additional reason that this was the first trip the witness had made with the engineer then in charge of the engine, and the first time the engineer had run this passenger train. The well-settled rule is that a witness cannot be contradicted by evidence which is collateral and irrelevant to the issue, simply for the purpose of discrediting him. Railroad Co. *v.* Linn, 15 Neb. 234, 18 N. W. Rep. 35; Greenl. Ev. § 449. This testimony was important, because the only negligence of defendant complained of was the failure to sound the whistle at this crossing, and there was a conflict of evidence upon this question, not greatly preponderating in favor of either party. We believe that the court erred in permitting such testimony to go to the jury.

Impeachment of witness—Collateral matter.

It is claimed by the defendant that Townsend was guilty of negligence in attempting to cross the track of defendant's road at the time of the accident. The facts, as shown by the record, appear to be: The plaintiff had lived at his then home for eight years, and had crossed the track at this point very often during that time, and had become familiar with it. In approaching the crossing at the time of the collision, he was going nearly north, and the train nearly east. The wagon-road, along which he was passing, before it reached the railroad track, was on higher ground, descending gradually until it crossed the rails. For some distance on the west side of the wagon-road there were brush and small trees, but they did not obscure the view of the railroad except for a rod or two immediately before it entered the defendant's right of way. The right of way itself was clear of brush and trees. The wagon-road first touched it about 60 feet from the rails. At that point

Facts concerning accident.

the track could be seen, west of the crossing, a distance of 500 feet; and, when 30 feet from the crossing, it could be seen 750 feet. Plaintiff himself testifies, when he was 6 or 8 rods from the crossing, he looked for the approach of a train, and from the place from which he looked he could have seen a train of cars 25 rods west of the crossing. He did not look for the train after he reached defendant's right of way. The jury found that he ceased to look at the distance of 70 feet before he reached the rails. He was driving his team at a slow walk, and the train was approaching at the rate of 35 miles an hour. He wore a woollen overcoat and cloth cap, and around his neck a scarf about 2 yards long and 15 inches wide. He testified that he did not hear the whistle of the engine, nor the tread of the approaching train. The defendant contends that this testimony establishes the fact that plaintiff was guilty of negligence, and that such negligence contributed to his injury, and for that reason insists that he ought not to recover. The plaintiff argues that, as plaintiff did look up the track, that was some evidence of care, and as the question was submitted to the jury, and they found in favor of the plaintiff, it is conclusive on that point. He further argues that it was the province of the jury to determine whether plaintiff's acts, under the circumstances proven, were negligent, and that by the verdict in his favor they determined that he had exercised sufficient care. The findings of the jury, and the evidence of the plaintiff himself, show that he was not prudent in approaching the railroad track in the manner he did. He testified himself that he knew it was about train time, though further added that he supposed the train had passed. We think that it is no proof of care for a party 6 or 8 rods from a railroad crossing to look for an approaching train, when from that place he cannot see more than 25 rods from the crossing, especially if he is driving at an ordinary walk, and the train is approaching swiftly. The jury found, in this instance, it was going at the rate of 35 miles an hour, and the testimony shows that it usually passed the crossing at the rate of 25 or 30 miles an hour. The plaintiff, living near the crossing, must have known its ordinary speed. If it was approaching even at the rate of 25 miles an hour, and had been anywhere in sight within 25 rods, it would have passed the crossing before the plaintiff could have reached it; and, if the train was not in sight, it would have been the duty of the plaintiff to have looked again for the train, especially when he had an unobstructed view for 60 feet just before he crossed the rails. In this case the jury found that the plaintiff stopped looking when he was 70 feet from the track, and was then near the right of way of the defendant. The evidence of the plaintiff himself, corroborated by one of his neigh-

Duty of plaintiff to look and listen.

bors, is that near the right of way, beside the wagon-road, was a thick clump of trees extending for one or two rods, so dense that the train could not have been seen when looking from the road from that place. It was the only portion of the road where the brush and trees obstructed the view of the railroad track. We believe that no man should be excused in driving onto a dangerous crossing without looking or listening for an approaching train; and if he looked from a point where he could get only a partial view of the track, not extending more than 25 rods from the crossing, when he was any considerable distance from it, he should have looked again when he was near it, and when he could have obtained an unobstructed view of the track. Durbin *v.* Navigation Co., 32 Am. & Eng. R. R. Cas. 148; Railway Co. *v.* Adams, 33 Kans. 427; Railroad Co. *v.* Beale, 73 Pa. St. 504; Pence *v.* Railroad Co., 63 Iowa, 746; s. c., 19 Am. & Eng. R. R. Cas. 366; Tully *v.* Railroad Co., 134 Mass. 499; s. c., 14 Am. & Eng. R. R. Cas. 682; Salter *v.* Railroad Co., 75 N. Y. 119; Seefield *v.* Railroad Co. [Wis.], 32 Am. & Eng. R. R. Cas. 109; Gunn *v.* Railroad Co., 35 N. W. Rep. 281; Beach, Cont. Neg. 63; Stepp *v.* Railway Co., 85 Mo. 229.

Effect of failure to give signal.

The plaintiff claims the negligence of the company consists in the fact that no whistle was blown at the whistling-post, a quarter of a mile from the crossing. That was negligence on the part of the railroad company, without question; but it is also to be determined whether the failure to blow the whistle caused the injury sustained by the plaintiff. Railroad Co. *v.* Morgan, 31 Kans. 77, 1 Pac. Rep. 298. When he approached the track, he did not hear the approaching train, even when it was almost upon him, owing either to his preoccupation of mind, or because his ears were muffled in his clothing. If his hearing was obstructed, it was his duty to have been more careful in looking for approaching trains. He was familiar with the crossing; knew the speed at which trains passed that place ordinarily. He knew it was about train time: and, if he attempted to drive across the track without any further effort to ascertain whether the train was coming than shown by the evidence in this case, it seems to us that he cannot be held to have used ordinary care. We do not mean that a man should be required to make nice mathematical calculations when approaching railroad crossings; yet we are of the opinion that, in crossing a track he was familiar with, knowing the usual way of running trains, the curves of the road and difficulty in looking down the track, he should not be excused from failing to look and listen for an approaching train from a point where he could either have seen or heard it. It was not simply his own safety to be considered in the matter, but the danger of derailing the train, and causing an accident that might

have been more serious. Both railroad companies and the travelling public have the right to a crossing; and it is the duty of the traveller, as well as of the engineer, in charge of the locomotive, to see that a crossing is free from danger when approached. While it may not be necessary for the traveller to stop and listen, yet it is his duty to use some care and caution in ascertaining whether a train is coming. If he had looked for an approaching train where he could have seen the track for any considerable distance, that would have been some proof of ordinary care. We have no wish to limit the rule established in this State, that, where the facts and circumstances are such that different men might arrive at different conclusions as to the degree of care exercised, it is then a question for the jury to determine. Railroad Co. *v.* Pointer, 14 Kan. 37; Railway Co. *v.* Fitzsimmons, 22 Kan. 686; Osage City *v.* Brown, 27 Kan. 74. But where the facts are established and the reasonable deduction to be drawn from them is strongly against the verdict of the jury, the court should hesitate to render a judgment thereon.

It is recommended that the judgment of the court below be reversed.

PER CURIUM.—It is so ordered: all the justices concurring.

Injuries at Railway Crossings—Failure to Give Statutory Signals.—See, *ante*, Omaha, N. & B. H. R. Co. *v.* O'Donnell, 346, and note, 349–351.

Same—Failure to Look and Listen.—See, *ante*, Hanks *v.* Boston & A. R. Co, 321, and note, 325–327.

STATE

v.

BOSTON AND MAINE R. CO.

(*Maine Supreme Judicial Court, June* 19, 1888.)

Negligence—Railroad-crossing—Absence of Flagman—Prohibited Rate of Speed.—Where a statute prohibits a railroad company from running a train across a highway in a populous part of the town, at a speed greater than a certain specified rate, unless the parties operating the railroad maintain a flagman or a gate at the crossing, the fact that such a gate has been left open and unattended, gives persons travelling across the line the right to expect that a train will not pass the crossing at a speed greater than the statutory rate, besides being evidence that a train is not presently due or expected.

Same—Imputed Negligence—Driver—Gratuituous Passenger.—In Maine the negligence of a driver is not imputed of a passenger carried gratuitously, who has no control over the driver.

Same—Contributory Negligence—Right to Recover.—Deceased and two companions, one of whom owned and drove the team, approached very slowly, in an open wagon, a level crossing of defendant's railroad. It was about 10 o'clock, on a starlight night. When about 350 feet from the crossing, a locomotive whistle was heard, but no bell was heard by them at any time. Another railroad passed in the immediate neighborhood; and deceased and his companions could not tell, from the sound of the whistle, upon which road the train was. The team moved on without stopping, and almost immediately upon reaching the crossing a collision took place, by which two of the three men were instantly killed. The approach to the crossing was upon a slightly descending grade, and the view of the track was almost entirely obstructed by houses and other structures. Gates had been constructed at the crossing; but they had been left open, and the flagman had left them for the night. *Held*, that the jury might have inferred that the travellers looked and listened after hearing the whistle; that there was evidence of negligence on the part of railroad company in running the train at a rate greater than the statutory rate; and in leaving the gates open, thus inviting persons to cross; and that plaintiff was entitled to recover.

ON report from Supreme Judicial Court, York County.

Statutory indictment for negligently causing the death of William M. Benjamin. After the introduction of plaintiff's evidence, the case was reported, it being stipulated that judgment should be entered for the State, if the facts were such as to authorize the jury to return a verdict for it.

Horace H. Burbank, Co. Atty., for the State.

Geo. C. Yeaton and *Benj. F. Chadbourne* for defendant.

PETERS, C.J.—After the plaintiff's evidence was out in this case, it was agreed by the parties that if such evidence be, in the opinion of the full court, sufficient to authorize a jury in any event to find for the plaintiff, a judgment may be entered against the defendants for the sum of $5000. Allowing to the plaintiff, under this stipulation, the benefit of the most favorable view which the evidence is legally susceptible of, it may be considered that the following facts are proved: The deceased, William M. Benjamin, for whose death the action is instituted in the name of the State, and two other men, of the names of Burnie and Hooper, the latter owning and driving the team, were sitting in an open one-seated wagon, and approaching at a moderate gait, or "very slowly," a level crossing of defendant's railroad over the highway in Biddeford. It was at about 10 o'clock, on a starlight night in November, 1886. The railroad and town road intersect at about a right angle. The three were persons of middle age, with physical faculties unimpaired, sober and intelligent, and were returning home from a lodge-meeting of some kind, over a road familiar to all of them. When within about 350 feet of the crossing, a locomotive whistle was heard, but no bell was heard by them

Facts.

at any time. The bell was heard by others at the moment when the locomotive was passing the crossing, the train at the time running at a rate of not less than 25 miles an hour through a compact portion of the city of Biddeford. When the whistle was heard, Burnie called Hooper's attention to it, and Hooper said he did not know which road it was on, meaning whether on the Boston & Maine or Eastern Railroad. Burnie replied that he could not tell from the sound which road it was on. The deceased said nothing, and nothing more was said by either of them. The team moved on without stopping, and almost immediately it reached the Boston & Maine track, when a collision took place between locomotive and team by which two of the three men were almost instantly killed. The way on which the parties were travelling was slightly descending towards the crossing, and a view of the coming train was mostly obstructed from the travellers by houses and other structures, and the plans and photographs show that there may have been no opportunity for the travellers to see the train, situated as they were, while in motion.

The defendants contend that the travellers did not look and listen after their interchange of words about the direction of the sound from the whistle. We think a jury would be justified in the belief that they did. On this point the survivor was not very explicit in his testimony; but he was not asked about it, nor was he at all exhaustively examined. The men did not, in fact, see the locomotive until they were within an estimated distance of 15 feet from the track,—the train being about 100 feet away,—and a collision may not then have been avoidable. At the place where the whistle was sounded, the two railroads were within 300 feet of touching together, then diverging until at the crossing they were about 1000 feet apart, the Eastern being the farthest away. It is reasonable to believe that the three men, as they approached the crossing, saw that the gates there were open and unattended by any person, and that there was no signal of any kind indicating that a train was expected. A red light was burning, the usual switch signal, which was not any warning to those using the common roads. The gates were of the double-arm pattern, operating on pivots on each side of the highway (when open, the arms standing erect); and these had been in use at this crossing for about three years. An employee was in daily attendance upon them from 7 o'clock A. M. until about 15 minutes after 7 P. M., when he usually locked the gates and left them for the night, doing so on the night of the catastrophe. The train which struck the wagon was the regular night Pullman train running from Boston to Bangor, on the Boston & Maine road. This train has run most of the time for many years over the Eastern Railroad, but had been running over the Boston &

Maine road for about a month before the accident, and has also run on the same road for a period of eight months during the year before the accident. The two roads were managed by the same company. The survivor (and the same thing may be fairly assumed of his associates) had seen that the gates were in operation at the crossing, but had never noticed that they were not at all times used when trains were passing. They supposed that they were so used. The flagman in the railroad employment testified that, when for any reason the gates were out of order, he used a green lantern by night and a yellow flag by day whenever a train passed.

It is not denied that the defendants were themselves guilty of negligence. They were running their train at a rate of speed upwards of four times the rate allowed by law. Chapter 377 of the Acts of 1885 prohibits a train running across a highway near the compact part of a town at a speed greater than six miles an hour, unless the parties operating the railroad maintain a flagman or a gate at the crossing. Had not the defendants been remiss in the discharge of this statutory duty, it is reasonable to conclude that the accident would not have happened. Nor would the accident have occurred, the defendants contend, if the deceased had not also been guilty of negligence. Great stress is placed by the defendant's counsel upon the position taken for his clients that the three men did not look and listen for the location of the train, or, if they did, that they paid no heed to the signals which their ears revealed to them. It certainly cannot be denied that it was an egregious blunder, for the team to continue moving on so near the crossing while the occupants could not tell from which railroad the sound of the whistle proceeded, unless other facts furnish an excuse for not stopping. The team should have halted. The very doubt felt by the men was notice enough of danger, unless they were, without their own fault deceived by the surrounding circumstances. The plaintiff's counsel insists that such excuse exists. It is contended on that side of the case that, taking into consideration that the train was not seen, though the deceased and his associates must have been intent upon their situation, as evidenced by their sudden silence as they were advancing on their way after their interchange of views on the subject, and considering also the fact that they had much reason to suppose that the Pullman train belonged upon the most distant road, the sight of the uplifted arms of the gates was evidence enough to dissolve the doubt in the minds of those men, and to induce them to believe that they could safely continue on without interruption. The plaintiff contends that such was the judgment of the three men, who for intelligence and experience would average well with

Absence of flagman at crossing—Open gate—Prohibited rate of speed.

men generally. The counsel for the defendants contends that the standing arms indicating open gates should not be regarded as any signal, or a sufficient signal, of safety, at any crossing where the law does not require gates to be maintained. At this place the gates were erected by the voluntary act of the company. But it is not a fair construction of the statute to say that it does not require gates to be maintained, or a flagman to be present, at all grade crossings, as to trains moving more rapidly at such places than six miles an hour. And while a neglect of the company to perform its duties does not excuse the traveller in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculation for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary. If the gates were open and the crossing unattended by a flagman, then these persons had a right to accept the fact as some evidence that the train would not attempt to pass the crossing at a faster speed than six miles an hour. Of course, full reliance cannot always be placed on an expectation that a railroad company will perform its duties, when there is any temptation to neglect them, because experience teaches us that it would not be practicable to do so. But such an expectation has some weight in the calculation of chances, greater or less according to the circumstances. But what essential difference can it make in the relation of the parties whether the statute requires a flagman at any point or whether absolute necessity requires one,—whether the legislature declares the necessity, or the company by its act confesses the necessity? The defendants, by their counsel, contend that the English and the New York authorities, cited by plaintiff, are based upon a statutory requirement that gates shall be maintained. That is not entirely correct. In a leading case (Stapley *v.* Railway Co., L. R. 1 Exch. 21) it was said that while there was no law requiring gates as to foot passengers, still the decision was that the footman in that case was fairly invited by the open gates seen by him to attempt a passage across the tracks. Nor do we find that the New York cases place the responsibilities of railroads wholly on what the statute law requires of them as to guards at crossings. It is said in Kissenger *v.* Railroad Co., 56 N. Y. 538, "though it is not negligence for a railroad company to omit to keep a flagman, still, if one is employed at a particular crossing, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company." See Glushing *v.* Sharp, 96 N. Y. 676. If the presence of a flagman and closed gates indicate a passing train, certainly the absence of the flagman and open gates must be evidence that a train is not presently due or

expected. The annexed authorities touch nearly to the point involved in the facts here presented. Wheelock *v.* Railroad Co., 105 Mass. 203; Tyler *v.* Railroad Co., 137 Mass. 238; s. c., 19 Am. & Eng. R. R. Cas. 296; Sonier *v.* Railroad Co., 141 Mass. 10; Whart. Neg. §§ 385, 386, and cases; Pierce, R. R. 203, and cases.

Negligence of driver not imputed to plaintiff.

The plaintiff's case is fortified by another consideration. He neither drove nor, as far as appears, had any control of the team on which he was riding. It is reasonable to suppose that the owner carried him either for hire or gratuitously as a neighborly kindness. His position was not of the same degree of responsibility to the railroad as was that of the driver. He was a comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team, or he could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent to the experience and discretion of the driver who was in the control of his own team; and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence. And we may consider this point in the argument in behalf of the plaintiff, unless we adhere to the doctrine of imputable negligence, which has been considerably practiced on in the courts, first promulgated in the case of Thorogood *v.* Bryan, 8 C. B. 115,—a doctrine which ascribes to a passenger the contributory negligence of a driver over whom he has no control. This doctrine was never adopted in Scotland, nor by the English admiralty court, and was never at rest, but has been constantly doubted and criticised in other English courts, until, in 1887, it was overruled by the court of appeal, without a dissenting vote on the question, in the exhaustively considered case of The Bernina, 12 Prob. Div. 58. The action in that case though originating in the admiralty, was brought under Lord Campbell's act, and was governed in all respects by common-law rules, and the full court of England unhesitatingly swept away the old rule, saying thas it was a fictitious extension of the principle of agency unwarranted upon any rule or theory of law. It is remarked in that case that the preponderance of judicial and professional opinion in England is against the doctrine, and that the weight of judicial opinion in America is also against it. The same decision has been made in the supreme court of the United States in Little *v.* Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, where it is said that the doctrine of Thorogood *v.* Bryan, rests upon indefensible foundation. It is there declared that the identification of the passenger with the negligent driver, without

his co-operation or encouragement, is a gratuitous assumption. The same view of the question is entertained by text writers generally, especially in last editions of their works. The older doctrine is rapidly fading out. A distinction has sometimes been attempted to be made between riding in a public or riding in a private carriage, but that idea has not prevailed to any considerable extent. The cases discuss, as an English court puts it, the broad question as to what is the law applicable to a transaction in which one has been injured, and in the course of the transaction there have been negligent acts or omissions by more than one party. In quite a number of the cases the facts were precisely as they are here, and the distinction is not heeded. A few cases like, or nearly like the present case are the following: Robinson *v.* Railroad Co., 66 N. Y. 11; Masterson *v.* Railroad Co., 84 N. Y. 247; s. c., 3 Am. & Eng. R. R. Cas. 408; Cuddy *v.* Horn, 46 Mich. 596; Transfer Co. *v.* Kelly, 36 Ohio St. 86; Bennett *v.* Railroad Co., 36 N. J. Law, 225; Railroad Co. *v.* Steinbrenner, 47 N. J. Law, 161; Railroad Co. *v.* Shacklet, 105 Ill. 364; s. c., 12 Am. & Eng. R. R, Cas. 156. See Borough of Carlisle *v.* Brisbane, 113 Pa. St. 544, and cases in note. We are not committed to the doctrine of Thorogood *v.* Bryan, in this state to an extent preventing its repudiation. In Dickey *v.* Telegraph Co., 43 Me. 492, the rule was acted on without any expression of dissent by counsel. The doctrine of imputable negligence as applicable to the relation of parent and minor child, which presents another and a somewhat different question, has been favorably alluded to in this state, but in cases where it did not affect the result reached on other grounds. Brown *v.* Railway Co., 58 Me. 384; Leslie *v.* Lewiston, 62 Me. 468. A class of cases against towns for injuries caused by defective highways, being statutory actions, stand upon a ground of their own, unaffected by the rule under discussion. On the terms of the submission of this case to the court by the parties, we think judgment must be entered for the plaintiff for the sum agreed upon as damages.

WALTON, VIRGIN, LIBBEY, FOSTER, aud HASKELL, JJ., concurred.

Accident at Crossing—Imputed Negligence.—Where an infant of tender years (here about nine years of age) receives an injury while being driven in a carriage by its father and while in its father's actual control, the infant will be affected by negligence on the part of the father contributing to the injury, and will be precluded by such negligence from recovering against a third party damages for the injury. Kyne *v.* Wilmington & N. R. Co., 14 Atl. Rep. 922. See, as to contributory negligence of parent barring child's recovery, Houston *v.* Vicksburg, etc., S. & P. R. Co. (La.), 34 Am. & Eng. R. R. Cas. 76, and note, 80.

Same—Prohibited Rate of Speed—City Ordinance.—In an action to recover damages for the death of plaintiff's intestate, it appeared that he

was travelling in a wagon along a street which was crossed by ten railroad tracks. The evidence showed that he did not stop his team after he had passed on to the tracks, and that he was struck and killed by a train of cars which was being backed on the tenth track. The deceased was familiar with the crossing and had frequently used it. It was shown that the train which caused the death was moving at the speed of over ten to twelve miles an hour. There were cars standing on several of the tracks, and a whole train was standing on the seventh track, the last car of which projected into the street. If he had stopped his team on the eighth track, he could have seen the train approaching about 300 feet away. A city ordinance prescribed that trains should not be operated within the city limits at a greater speed than six miles an hour. It was *held*, that a traveller on a highway when approaching a railway crossing is not under all circumstances bound to stop his team and look or listen for an approaching train; that such question was for the determination of the jury; that the deceased might be presumed to have known the ordinance, and had the right to assume that it would be obeyed, and was not guilty of contributory negligence in attempting to cross after seeing a train. Schneider *v.* Burlington, C. R. & N. R. Co. (Iowa), 39 N. W. Rep. 916. See, generally, as to duty of railroad companies as to speed in approaching crossings, Tugenheim *v.* Lake Shore, etc., R. Co., 32 Am. & Eng. R. R. Cas. 89; Kelly *v.* St. Paul R. Co., 6 Am. & Eng. R. R. Cas. 93; note to Philadelphia, etc., R. Co. *v.* Troutman, 6 Ib. 124; Indianapolis, etc., R. Co. *v.* McLin, 8 Ib. 237; note to Cleveland, etc., R. Co. *v.* Nowell, 8 Ib. 381; Goodwin *v.* Chicago, etc., R. Co., 11 Ib. 460; Kelly *v.* Hannibal, etc., R. Co., 13 Ib. 638; note to Johnson *v.* Louisville, etc., R. Co., 13 Ib. 626; Western, etc., R. Co. *v.* King, 19 Ib. 255; Reading, etc., R. Co. *v.* Ritche, 19 Ib. 267; Howard *v.* St. Paul, etc., R. Co., and note, 19 Ib. 283–284; Bolinger *v.* St. Paul, etc., R. Co., 29 Ib. 408; note to Wakelin *v.* Louisville, etc., R. Co., 29 Ib. 439.

Same—Contributory Negligence.—In an action to recover damages for personal injuries, it appeared that plaintiff was driving at a moderate trot, and that defendant's car was going as fast as a man ordinarily walks; that the car was moved by gravity only and could be stopped by the brakes within a distance of five feet according to the evidence for the defendant, and ten to fifteen feet according to the evidence for the plainiff; that plaintiff's horse and carriage had crossed the track in front of the approaching car so far that the hind wheel was struck by the car in such a manner that the carriage was not prevented from going along twenty or twenty-five feet before the plaintiff was thrown out. There was evdience that it was unusual for cars to pass at that hour; that defendant had no reason to expect them; that plaintiff was looking in the direction from which the car was coming; that the car could not be seen by her until she herself came upon the track while her horse could be seen from the car before she or the carriage reached the track. It was held that the plaintiff had under the circumstances the right to expect that those controlling the car would endeavor to avoid a collision, and that the case was properly left to the jury to say whether the plaintiff was in the exercise of due care and the defendant negligent. Cleaves *v.* Pigeon Hill Granite Co., 145 Mass. 541. For a full discussion of contributory negligence, and the duty to look and listen, see, *ante*, Hanks *v.* Boston & A. R. Co., 321, and note, 325–327.

MISSOURI PACIFIC R. CO.

v.

LEE.

(*Texas Supreme Court, April* 17, 1888.)

Negligence—Injuries Causing Death—Pleading—Petition.—If a petition alleges acts of negligence on the part of the defendant at the time of a collision causing the death of plaintiff's son; that, without negligence on the part of deceased, he was struck by the passing train and killed; and that the death was caused by the negligence of defendant;—these allegations are sufficient to state the cause of action.

Same—Highway—Railroad-crossing—Dedication.—Where the testimony shows that the owner allowed the public use of a road by his customers, as a means of access to his mill, and by the public in passing between certain villages; that the owner of the land had required the railway company to make a crossing; that a crossing had been kept up, and had been used by the public for at least six years;—there is evidence from which a jury may infer a dedication to public use.

Same—Public Road—Establishment.—The fact that a statute authorizes the county authorities "to lay out and establish, change, and discontinue public roads and highways" does not negative the existence of public roads otherwise established, and relieve the railroad from the duty of running its trains across a public road by dedication, so as to avoid injury to the public.

Same—Contributory Negligence—Degree of Care Required.—If, in an action to recover damages for negligent killing of a person, the court has instructed the jury that the degree of care required of the deceased was such care in approaching and attempting to cross defendant's railroad as a man of ordinary prudence under similar circumstances would have used, the defendant is not entitled, under the rule adopted by the Texas courts, to an instruction that it was the duty of deceased to make use of his senses of sight and hearing to discover the approaching train, and that if injured by reason of failing to look, when, by looking before driving upon the track, he might have seen the approaching train, no recovery can be had.

Same—Contributory Negligence—Absence of Care.—In an action to recover damages for death negligently caused, it appeared that deceased was driving a wagon, with high side-boards, for a distance of about 400 feet, nearly parallel to the track, and less than 200 feet from it; that he turned and travelled about 75 feet to reach the track; that the angle between the road and the right of way was grown up with sun-flowers, so that the view of the track was obstructed; that a violent wind was blowing; that trains in passing the crossing usually had signalled by ringing the bell or blowing the whistle; that a passenger train was behind time and running at unusual speed; that deceased could not have seen the approaching train unless perhaps on a sharp lookout; that no bell was sounded or whistle blown, and the wind-storm deadened the sound of the train. *Held*, that the facts were such as to require the submission of the case to the jury.

Same—Measure of Damages—Instruction.—The court instructed the jury that, if plaintiff was entitled to a recovery, she was entitled to a verdict for "such sum as you may, under the evidence, reasonably believe plaintiff might have received from the assistance of the deceased had he not been killed; and you may, in estimating such sum, consider the age of the deceased, the time he might have lived, the age of the plaintiff, the time she might probably live, and any other evidence tending to show what damages, if any, she might have suffered by reason of the killing of" her son. *Held*, that, although the measure of the damages is a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from her child had he not died, the enumeration of subjects of consideration did not extend the limits of investigation, beyond what, from the testimony, the plaintiff reasonably would have received had her her son lived, and was not misleading.

APPEAL from District Court, Hill County.

Action by Mary A. Lee, against the Missouri Pacific R. Co., to recover damages for negligently killing her son while attempting to cross defendant's track. The defendant appealed from a judgment for the plaintiff. The opinion states the facts.

R. C. Foster and *A. C. Wilkinson* for appellant.

Crane, Ramsey & Tarlton for appellee.

WALKER, J.—This is an appeal from a judgment in favor of appellee for damages for the killing of her son. The appeal questions (1) the sufficiency of the petition; (2) the question whether the crossing at which the death was caused was at a public road; (3) the sufficiency of the testimony to negligence on part of the railroad and due care on part of the deceased; (4) the charge of the court upon the measure of damages; and (5) the verdict as excessive.

Questions presented.

1. The petition alleges acts of negligence on part of the defendant at the time of the collision; that, without negligence on part of deceased, he was struck by the passing train, and killed; and that the death was caused by the negligence of defendant. These allegations give a cause of action.

Sufficiency of petition.

2. The court charged the jury "that a public road is one so made by order of the commissioners' court,—the same being marked out, surveyed, and worked by order of said court,—or one which is used and appropriated, without order of court, to the use of the public for such length of time as to show it has been dedicated to the use of the public, and is so used by the public; and where a road has been so used, appropriated, and dedicated, the same will, in the contemplation of law, be a public road." There was testimony to the public use of the road as a way to the gin and mill of the owner of the land, by his customers, and by the public in passing from the villages Itasca and Covington. The owner of the land had required the railroad company to

Whether crossing was public—Dedication.

make a crossing where an old road had been. The crossing had been kept up. It had been used by the public for at least six years. It was a public road, in fact, from the manner and extent of its use. The intent of the land-owner, with reference to the use of the road and crossing, was clear as to persons coming to his gin and mill. His knowledge of the public use as a highway by the public, in passing between the villages Itasca and Covington, was undisputed. The intent on part of the owner, and use by the public, evidence a dedication. The jury in each particular case passes upon the sufficiency of the testimony to the interest of the owner. The intent may be presumed from the use alone. From the acts of the owner, and the facts of public use as given, the jury may find the fact of dedication without reference to any particular time. Thomp. Highw. 55, and cases. As to the effect upon the railroad company, of the facts in evidence upon this character of crossing, it seems that the views taken by our court of appeals are sound, as stated in a well-considered case (opinion by Justice Wilson), 2 Civil Cas. Ct. App. 204: "Where a railroad company had for several years recognized and maintained a road-crossing over its line of railway as a crossing for the public, it was held to be estopped from setting up, as a defence, that the road was not a public road. Under these circumstances, the road will be considered a public road, within the meaning of the statute." Considering the issue as intended to ascertain the relations and duties of the railroad company and the travelling public with reference to this crossing, we think the charge was sufficiently specific. It required the jury to determiue the fact of dedication by the owner and use by the public.

But it is insisted that the amendment to article 4231, Rev. St., in inserting the term "public" as descriptive of the roads to which in that article the duties enumerated attached, had the effect of a statutory definition, and that only two roads "public" by the terms of the statute is the protection secured. The county authorities have power "to lay out and establish, change and discontinue, public roads and highways." Rev. St. art. 1514. This power does not negative the existence of public roads otherwise established. There is no law in the statutes of Texas, nor consideration of policy, prohibiting a road from being made by dedication by the owner of the soil, and sanctioned by the needs and by the use of it by the public. The courts would protect such a road from invasion. The extent of the use of a road determines its character as public or not as a fact. The purpose of the statutes, or the principal one, imposing duties upon railroad companies in running their trains across the public roads, was to protect human life. That necessity would attach to the crossing of every road in fact public, and where

the extent of travel made it a duty on the part of the owners of the railroad trains to look after the safety of those using the road as a highway. We cannot attach to the word "public," in the amended act, any other meaning than as including all public roads, whether in law or in fact. We think, where the crossing is public, and that fact known to the railroad company, that the duty of carefulness arises. Ewen *v.* Railway Co., 38 Wis. 634.

3. The court charged the statutory duties imposed upon railroad companies when crossing public roads. The degree of care required of the deceased was stated to be "such care, in approaching and attempting to cross the defendant's railroad, as a man of ordinary prudence, under similar circumstances, would have used." The jury were repeatedly told that, if the deceased was wanting in such due care, his mother, the plaintiff, could not recover, whatever they might find as to the conduct of the defendant. The defendant asked instructions to the effect that it was the duty of deceased to make use of his sense of sight and hearing to discover the approaching train; and that, if injured by reason of failing to look when, by looking before driving upon the track, he could have seen the approaching train, recovery could not be had. Our courts have refused to recognize as a duty of the trial judge to attempt to define duties, neglect of which would be negligence, in the absence of statutory definitions of duties, disregard of which is negligence as matter of law. Railway Co. *v.* Wilson, 60 Tex. 142; Railway Co. *v.* Chapman, 57 Tex. 75. The judge is to inform the jury as to the degree of diligence or care or skill which the law demands of the party, and what duty it devolves upon him, and the jury are to find whether that duty has been done. 1 Greenl. Ev. (14th Ed.) 72, note c. The rule given as to degree of care required of deceased, is recognized by former decisions of this court. Railroad Co. *v.* Randall, 50 Tex. 254; Railway Co. *v.* Cowser, 57 Tex. 302; Railway Co. *v.* Waller, 56 Tex. 334; Railway Co. *v.* Murphy, 46 Tex. 356; Eames *v.* Railway Co., 63 Tex. 660. Having given the proper rule to the jury, the judge had performed his duty, unless from the whole case as made by the testimony the plaintiff had no testimony upon which the jury could reasonably have found a verdict in her favor, in which state of facts the court could have refused to submit the case to the jury. The plaintiff's case would fail from absence of testimony as to any negligence on part of defendant, or upon absence of any testimony from which a jury could find due care, or its equivalent,—absence of negligence on part of the deceased.

Contributory negligence—Degree of care required.

Appellants insist that the testimony discloses a total absence of care on part of deceased, and that his death was caused by

his recklessly attempting to cross the track, when any, the slightest, care would have informed him of the danger. What is due care under a given group of facts must be determined by the jury by applying the rule as to what, in their judgment, a man of ordinary prudence would have done under the attendant circumstances. It is reasonable that a sane man will not knowingly and recklessly expose himself to imminent bodily danger; that the instincts of self-preservation existed. It may be inferred that the deceased did not know of the presence of the approaching train at the time he drove upon the track. We may ask, why did he not know it, and what was his duty to know it? It appears in the record that the deceased, in a wagon with high side-boards, had been driving southward near 400 feet, nearly parallel, with the track at a distance less than 200 feet from it; that he turned to the right, and travelled west about 75 feet, to reach the track; that at the angle, and between that and the track, the right of way, which was 50 feet, was grown up with sun-flowers and weeds so high that the view of the track was obstructed. A violent wind was blowing from the south. The trains, in passing this crossing, usually had been signalled by the ringing of the bell, or the blowing of the whistle. The train, a passenger train, was behind time, and was running at unusual speed. There is testimony that from the angle and to the track the deceased could not have seen the approaching train, unless, perhaps, on a sharp look-out, from the weeds, etc., obstructing his view. It does not appear that in going southward, parallel with the track, and going in same direction with the train, he could have seen the train, unless he had risen to his feet in the wagon, and looked back upon the track. From the testimony, we may infer, from the speed with which the train was moving, that the train was not in his sight, save by looking back; else it had reached the crossing before the deceased. The deceased had a right to be upon the road; had a right to cross the track. No bell or whistle sounded, warning the approach of the train. Deceased had a right to expect such signals. The weeds obstructed his view; the wind storm deadened the sound of the train. He was run upon and killed without warning. In this state of facts, if the road was public, and the statutory duties required of defendant in crossing public roads existed, then the court could not properly withhold from the jury the right to pass upon the questions of negligence and due care, etc. The charges asked by the defendant, and refused, where not already given, were not applicable to the case, and no error was committed in refusing them.

4. The measure of damages given by the court is "such sum as you may, under the evidence, reasonably believe plaintiff might have received from the assistance of said Robert E.

Lee [the deceased], had he not been killed by the train of defendant; and you may, in estimating such sum, if any, consider, under the evidence before you, the age of said deceased, the time he might have lived, the age of the plaintiff, the time she may probably live, and any other evidence tending to show what damages, if any, she may have suffered by reason of the killing of said R. E. Lee. . . . You will find for plaintiff such damages, under the instructions hereinbefore given, as you may think will compensate her for the loss, if any, she may have sustained by the killing," etc. We do not believe that the use of the word "might," instead of "would," could have misled the jury as descriptive of the pecuniary benefit anticipated. Nor does it appear that the enumeration of subjects of consideration necessarily or even probably extended the limits of investigation by the jury beyond what, from the testimony, plaintiff reasonably would have received had her son lived. Nor is the further clause, as to compensation, misleading; for express reference is made to the preceding part of the charge. The true measure is "a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from her child had he not died." Galveston *v.* Barbour, 62 Tex. 174; Railway Co. *v.* Ormond, 64 Tex. 490; Railway Co. *v.* Cowser, 57 Tex. 293; Railroad Co. *v.* Nixon, 52 Tex. 19; Rev. St. art. 2909.

Measure of damages.

5. The amount of the verdict is larger than, under the testimony, probably this court would have found. But there was testimony that the deceased was the eldest son of his widowed mother; that he was sober, industrious, and economical. He worked for his mother; he aided her with counsel and advice. His devotion to his mother was such that his neighbors could testify to repeated declarations that he would support her as long as she lived. He was but a farm hand working for wages, and his mother a renter. The idea given in the testimony of this boy's character, habits, and person is that of a prospective useful and prosperous citizen, from whom the mother, but for his taking off, would have received assistance greater probably than has been given her. In Railroad Co. *v.* Kindred, 57 Tex. 503, after an examination of the authorities, it is announced that "the damages in such cases are essentially indefinite; hence the law furnishes no definite measure therefor."

Verdict not excessive.

Finding no error in the record, the judgment below will be affirmed.

Accidents at Crossing — Contributory Negligence — Province of Jury.—Plaintiff was driving a truck along a private way, through defendant's yard, which was commonly used by teams in going to and from an elevator, and which crossed a large number of railway tracks. His view of the main track

used by passenger trains was obstructed by a line of freight cars standing upon the next track, which had been opened at the crossing of the private way to form a passage for teams to cross the tracks. Plaintiff was about to cross the main track. He did not stop, but listened for the approach of the trains. Hearing no signal he attempted to cross, but was struck by an engine which had just left the passenger station, and was proceeding at a speed of ten or twelve miles an hour. There was evidence that there was no signal given of its approach. *Held*, that the question respectively of the negligence of the plaintiffs and defendants was properly submitted to the jury. Pierce *v.* Humphries, 34 Fed. Rep. 282.

For a full discussion of the question of contributory negligence and the duty to look and listen, see, *ante*, Hanks *v.* Boston & A. R. Co., 321, and note, 325–327.

As to what Constitutes Dedication of Land for Highway.—See Brokken *v.* Minneapolis, etc., R. Co., 7 Ib. 573; Campbell *v.* O'Brien, 10 Ib. 266; note, 24 Ib. 308.

WINSTANLEY

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Wisconsin Supreme Court, October* 9, 1888.)

Negligence—Crossing—Signal— Statutory Provision.— Although there may be no express provision of law requiring a sign to be erected at, or a bell to be rung upon approaching, a crossing, it may be a question for the jury whether such precautions ought not to be taken at a dangerous crossing.

Same — Excessive Speed—Statutory Regulation.—Where by law the speed of a train at a particular place is limited to six miles an hour, the court properly refuses to instruct the jury, and that the speed of the train at the crossing was not the proximate cause of the accident, when, if it had not been for an excess in speed of two miles an hour, the train would not have been near the crossing when the deceased attempted to pass over it.

Same — Duty to Look.—Where there are or might be many circumstances which might prevent the person killed or injured from availing himself of the advantage of looking for a train, or of notice that it was about to approach, as the inability to control his team, and other intervening causes, an instruction that the jury must find for the defendant if the deceased could have seen the approach of the cars in time to stop his team, or he was notified of the approach of the train before he started, is properly refused.

Same—Province of Jury.—In an action to recover damages for negligence causing the death of plaintiff's intestate, it appeared that deceased turned towards the crossing at a walk, and that he could not have seen or heard the train until his horses' heads were within four feet of the rail on the crossing. When the car was almost behind him, the horses stepped upon the rail, and the car caught upon the collar of the nearest horse, turned them off to the left, and for two rods carried them along by the side of the

car. Deceased was thrown under the car and killed; no signal was made by the engine which was pushing the car. *Held*, that the verdict of the jury, upon the contributory negligence of the plaintiff, was properly taken.

APPEAL from Circuit Court, Winnebago County.

Action by John Winstanley, as administrator of his son, Robert Winstanley, deceased, against the Chicago, Milwaukee & St. Paul R. Co., to recover damages for negligently causing the death of plaintiff's intestate. The jury returned a verdict for the plaintiff, and assessed the damages at $1500. The defendant appeals from a judgment entered thereon. The opinion states the case.

John W. Cary, Burton & Hanson, and *Charles Barber* for appellant.

Weisbrod, Harshaw & Nevitt (*Gabe Bouck*, of counsel) for respondent.

ORTON, J.—This action is to recover damages which the respondent sustained by the death of his son Robert, which was caused by the negligence of the appellant company, and the plaintiff recovered $1500. The main facts were as follows: The railroad runs nearly north and south through that part of the city of Oshkosh, and there is a side or spur track which runs in the same direction quite a long distance, by and to accommodate several mills and manufacturing establishments. On the west side of said track there is a large building used for a glazing-shop, 120 feet long and 50 feet wide, with a platform, running along the east side, 6 feet and 4 inches wide and within 2 feet and 8 inches of the west rail of the spur track. There is also a platform of about the same width along the north end of said glazing-shop, and a door into the shop about the middle of the building, and steps at each end of this platform. Immediately in front of this platform there is, and has been for a long time, a road or private way, from a mill some distance west, across the spur track, and on towards High street east, and the crossing is built a little north of the platform, and very near the northeast corner of the glazing-shop. The spur track is used for hauling loaded cars south about 7 o'clock in the morning, and running empty cars back over this road-crossing about 8 o'clock daily, with no more irregularity than may be caused by a longer time to unload the cars at some times than at others. It was about 8 o'clock when this death occurred, and an engine was pushing several empty box-cars on the track towards the north. The deceased, a boy about 18 years of age, had been working with his father's team for one Martin, hauling loads from said mill west of the crossing; and on this morning, with another workman, had been to the mill for such purpose,

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and, not finding Martin, had returned and left his team standing about six feet from the north platform, and went into the glazing-shop to warm himself; and he and the other workman came out and got into his wagon, and drove towards the road-crossing, about 26 feet distant, and on a walk, as the witnesses for the plaintiff testified. When his team came within about four feet of the rail at the crossing, the deceased, from where he was sitting in his wagon, could have seen for the first time the north end of the first box-car if it had been within probably about 30 feet south of the crossing. Before reaching that point, nearly the whole track south, for a long distance, was hidden from his view by the glazing-shop and other buildings. When the team, with their heads probably turned a little to the left, had come nearly to the west rail of the track, with their heads a little beyond it, the northwest corner of the first box-car came in contact with the collar of the off horse, and caught behind it, and, as it passed on, wheeled the team around to the left, and pulled them along outside of the track about two rods, where the car became disengaged from the collar, and went on, and the horses stopped. When the team was thus suddenly turned about to the left, the deceased, either by the tilting of the wagon-box, or by the sudden stopping or turning of the wagon, or in some other way, was thrown forward under the car, and killed. From the manner in which the corner of the car caught the collar of the horse, the horse's head was probably turned somewhat towards the left. The corner of a car is some distance over and outside the rail of the track, and the forward feet of horses are about even with or a little behind the collar, and therefore the horses' feet had not yet come to the first rail of the track, although their heads may have been over it. The team cannot be said to have come onto the track or to have hardly come up to the track. The wind was blowing strongly to the south. The testimony on behalf of the plaintiff tended to show that no bell was rung or whistle blown on the train; that the train was running at the unlawful rate of speed of eight miles an hour; and that there was no sign near the crossing, with the warning on it of "Look out for the Cars;"—and the jury were warranted in finding that such were the facts.

Duty to sound signal and erect sign.

The second and fifth errors relied upon by the learned counsel of the appellant are that "the court erred in refusing to instruct the jury that the appellant was under no obligations to sound a whistle for the crossing," and in "overruling the appellant's objection to the following question: 'Was there any sign up at the crossing of the road over this track in question?' 'Was there a sign, Look out for the cars?'" These alleged errors may be disposed of together, as being within the same reason, and resting upon

the same general ground. The contention is that the law does not require the whistle to be blown or such a sign to be put up as an absolute duty, and therefore the negligence of the appellant cannot be predicated on its failure to do so. It may be true that there is no express provision of law requiring these things to be done in such a place, yet it may be a question for the jury whether such precautions ought not to have been taken at such a very dangerous crossing, like the duty of the company to keep a flagman at certain crossings where the statute does not require it, but where there is an extraordinary liability of collision with those passing over them, as in Guggenheim *v.* Railroad Co., 32 Am. & Eng. R. R. Cas. 89, and in Hoye *v.* Railway Co., 67 Wis. 1, and like the duty to blow the whistle, as in Roberts *v.* Railway Co., 35 Wis. 679.

Excessive speed—Statutory regulation.

The third error relied on is "the refusal of the court to instruct the jury that the speed of the train was not the proximate cause of the accident." Why was the speed of the train, at the rate of two miles an hour faster than the law allowed, not the proximate cause of the accident, when, if it had not been for this excess of speed, the train would not have been near the crossing when the deceased attempted to pass over it, and the deceased would have passsd over it with safety before the train would have arrived there at the lawful speed of six miles an hour? There could scarcely be a cause more proximate to the accident. If the deceased did not contribute to cause his own death by his culpable negligence it might be said that he was killed by this excess of speed. It was negligence in law to run that train more than six miles an hour in such a place, and this fault of the company cannot be extenuated by any view of the case. The fourth error complained of is the refusal of the court to give the eighth and ninth instructions asked by the appellant. Such instructions were that, "if you find that the deceased, Robert Winstanley, had he looked when his team was from four to six feet from the rail of the track, could have seen the approach of the cars in time to have stopped his team; and if you find that the deceased was notified of the approach of the train just before he started his team, then, in either case, your verdict must be for the defendant." It is extremely doubtful whether, in any case, these instructions ought to be given, and much more so in this, where there are or might be so many circumstances which might prevent the person killed or injured from availing himself of the advantage of such looking and knowing, such as the inability to control his team, and other intervening causes. Such instructions make negligence in the law, and absolute, when it depends altogether upon a variety of facts and circumstances which ought to be

Duty of plaintiff to look—Instructions.

considered by the jury. An instruction in substance like the said eighth instruction asked was held to have been properly refused in Shaw *v.* Jewett, 86 N. Y. 617; s. c., 6 Am. & Eng. R. R. Cas. 111, and the court said: "This is not the rule. The plaintiff is not bound to see. He is bound to make all reasonable effort to see that a careful, prudent man would make in alike circumstances." But the court, in its general instructions to the jury, which were unusually full, fair, able, and impartial, gave these very instructions in substance, and the appellant, at least, has no reason to complain.

The only remaining error complained of is the refusal of the court to direct the jury to render a verdict for the defendant.

Reasons for taking case from jury.

This brings us to a consideration of the facts and the merits of the case. The main reasons given why the court should have taken this case from the jury, and directed a verdict, are (1) that the deceased, when his team was about four feet from the rail of the track, could have seen, had he looked in that direction, the approaching train in time to have stopped his team; and he did not look, or he would have stopped his team before they got so near the track; (2) that the deceased had for over a year previously been engaged in driving a team over this private road and crossing, and must have known that this train was due at the crossing about this time; and (3) that the witness Martin saw the deceased while he was standing on the north platform of the glazing-shop before he got into his wagon, and told him that the train was coming, and that he replied, "I can make it." That a person approaching a railroad crossing should look and listen, if looking and listening would do him any good in protecting him from injury, before attempting to cross over, has been as persistently insisted upon by this court as by any court in this country or in England. It is not common care and prudence for such person to drive heedlessly, without taking such reasonable and natural precautions to secure his safety. If, for a considerable distance from the crossing, his view towards an approaching train is cut off by buildings, embankments, or other obstructions, greater caution should be used, by listening or by doing other things which a reasonably prudent man would be likely to do in order to ascertain whether a train was so near the crossing as to make dangerous or hazardous his attempt to cross over in front of it. What such other things are, must be determined by the facts of that particular case; and they cannot be classified by any general rule. If the view of any such person is cut off until he is near the crossing, and he could then, by looking, see the danger in time to stop, or in any way avoid a collision with the train, he should do so; and, as a general rule, it would be such a want of common care and prudence as to pre-

Plaintiff's contributory negligence—Looking and listening.

clude his recovery of damages resulting from such a cause if he does not do so. In any case, it would be heedless and reckless to drive or go on, without any precautions for his safety. These principles have been urged and made especially emphatic, and carried to the utmost extent consistent with reason, in many cases in this court, and especially in the late case—in reference to its own peculiar facts and circumstances—of Seefeld *v.* Railway Co., 70 Wis. 216; s. c., 32 Am. & Eng. R. R. Cas. 109; and nothing could well be added to what is said in the opinion of Mr. Justice Lyon in that case. The instructions of the court in this case contain a very full and fair, and especially able, exposition of these principles in application to the facts of this case. They go to the extent of almost saying that it was the duty of the deceased to have looked for and seen the approaching train, and to have stopped his team within that four feet, and prevented them from going upon the crossing in front of the train. Whether the instructions in this respect were strictly correct, we need not decide; for they were very favorable to the appellant, and the company, at least, ought not to complain. The facts of this case are peculiar, and essentially different from those of any other case cited by the counsel on either side or found in the books. It was a cold, brisk morning, when men out of doors move quickly, and teams standing in the cold wind are restless, and, when started, move with alacrity and briskness. The wind was blowing violently from the north towards the approaching train, and whistled around the building. No one of the plaintiff's witnesses about there heard any bell or whistle. The deceased and his fellow-workmen jumped into the wagon, headed towards the crossing, only about 26 feet away. He drove upon a walk—probably a fast walk. Had he looked or listened, he could not have seen or heard the train until his horses' heads were within about four feet of the rail on the crossing. Had he looked then, instantly, he would have seen the front box-car within a very few seconds from the crossing. It was almost right upon him. It is quite too strict a duty to have required him to look instantly, when he could have first seen the first corner of it, as it appeared, moving in sight, just past the corner of the building; and here an instant counts much. The horses, after that, could take but a step to bring their heads over the track and feet near the rail, where the car caught upon the collar of the nearest horse. The team could scarcely have been said to be on the track. They did stop; at least, they did not go farther forward. They turned, or were turned, off to the left, and then for two rods they walked along by the side of the car. The deceased was not killed on the crossing or by being on the track of the road. He was thrown under the car from some distance away, and from the end or corner of the wagon. The lips of the driver

are sealed in death, and we cannot tell what he saw or when he looked, or how the circumstances of this most critical situation and condition of danger appeared to him. He evidently saw his danger; and it would be but natural that he would make every effort to escape it. Did he see the train before his horses' heads were over the track, and while they were within those four feet of the rail? Did he look? Did he stop his team as soon as he could after seeing the train, or try to do so? Who can say? Who knows? We cannot know that he did not try to stop his team, and that he did not look as soon as he could, reasonably, after looking would be of any use. The emergency is too great and the danger too sudden for deliberation; and, for aught we know, he did make every reasonable effort to stop his team in time. His culpable negligence under such circumstances must be clearly shown, to defeat this action. Does it clearly appear, or was it clearly shown by the evidence we have? We think not. The peculiar circumstances of this emergency were too much shrouded in doubt and uncertainty to now coolly sit in judgment over the deeds of omission or commission of the unfortunate driver of that team, and determine with any certainty whether he did too little or too much within such narrow limits of time and space. This is very far from such a case of clear and culpable negligence as the court, as a matter of law, would be warranted in so declaring; and no case has been cited of sufficient analogy in its facts to be authority for so holding. On the question of the contributory negligence of the deceased in such a case, the verdict of a jury ought to be taken as conclusive. "If the inferences to be drawn from the testimony are doubtful or uncertain, the question of negligence is for the jury." Seefeld *v.* Railway Co., *supra*. In that case "the plaintiff knew and remembered that the train was due and would pass the crossing just about the time he reached it,"and many other facts are quite different from the facts of this case. The circuit court did not err in refusing to direct a verdict for the defendant. On the question whether the deceased knew that this train was due at this time, the evidence is not by any means clear and satisfactory. He had been driving a team about there for a year, and perhaps sometimes over this crossing; but whether he had ever noticed the trains on this side or spur track sufficiently to know that they had regular times in the morning of crossing this private way, is by no means clear. There is no evidence that he did know this. It is a mere inference, at best, from very remote facts. These trains were not regular; for their time of passing this place depended upon the time required to load or unload the cars before they were run back over this crossing. It might be 8 o'clock, or later. We cannot, therefore, say, as a matter of law, that he did know that this train was due and

would pass this crossing at that time. The court substantially instructed the jury that, if they believed the testimony of the witness Martin,—that he told the deceased that the cars were coming, and that he replied "I can make it,"—they must find for the defendant. That instruction was unquestionably correct; for it would establish the fact that the deceased knew the train was near by, and attempted to beat it over the crossing, or to pass over first, and take his chances. The jury evidently did not believe this testimony. The question here is: Were they warranted in rejecting it? There was no general impeachment of this witness, but several witnesses who were present on and about the platform, at the time, and would have seen Martin had he been there to say this to the deceased, testified that they did not see him, and that they remained there all the time, from the arrival of the deceased, to his death, and would have been likely to have seen him had he been there as he testified. This case was tried in the city where the jury would be likely to know more or less of the witnesses; and they heard Martin and the other witnesses testify, and could better judge of their credibility than this court could from this mere record. The credibility of witnesses is a question peculiarly for the jury, and scarcely ever for the court in jury cases. We do not think we would be justified in deciding, as a matter of law, that the jury were bound to believe the testimony of Martin, as against the other testimony. This case was very ably and thoroughly tried, and the rulings of the court were unusually considerate, judicious, and correct, and the record is free from error. The judgment of the circuit court is affirmed.

Accident at Crossing—Duty of Traveller.—Plaintiff, who desired to cross the defendant's track, on reaching it, found that the main track was obstructed by a line of cars. He stopped on the edge of a side track, and looked in front of him in one direction for the approach of an engine. He remained on the side track for about one and a half minutes, when he was struck by the pilot of an engine coming up behind at the rate of six or eight miles an hour. No bell was rung or whistle blown. The jnry were instructed that it was plaintiff's duty to look and listen for approaching trains; and, if one stops so near a railroad track as to be struck by an engine, without looking in both directions and listening, and is injured, he cannot recover although the person in charge of the engine may have been negligent. It was held that the case having been submitted to the jury upon instructions very favorable to the defendant, the defendant could not complain of a verdict for the plaintiff. The defendant pleaded that, although the statute required the person in charge of a train to ring a bell or blow a whistle continuously for a distance of eighty rods from any crossing, the fact that the engineer failed to do so did not amount to negligence in the present case, because the street was obstructed by a standing train; but it was held that the fact of the obstruction did not alter the duty of the company. The engineer testified that he did not see the plaintiff on the track; but there was proof that there was nothing in front of the engine to obstruct his view of the track. It was held that the engineer's testi-

mony was not sufficient to rebut the presumption arising from the circumstances of the case. Brown *v.* Griffin (Tex.), 9 S. W. Rep. 546.

Highway-crossing—Failure to Give Statutory Signals.—See, *ante*, Omaha, N. & B. H. R. Co. *v.* O'Donnell, 346, and note, 349–351; Atchison, T. & S. F. R. Co. *v.* Townsend, 352.

Same—Duty to Look and Listen.—See, *ante*, Hanks *v.* Boston & A. R. Co., 321, and note, 325–327.

Same—Duty as to Speed.—See State *v.* Boston & M. R. Co., 356, and note, 362–363.

BUCHANAN

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Iowa Supreme Court, October* 8, 1888.)

Negligence—Accident at Crossing—Flagman.—Plaintiff, when approaching a railroad track, observed that a freight train blocked the way and stopped about half a block from the track, to await an opportunity to pass. While the caboose was passing over the crossing, the flagman came round it and signalled to the plaintiff to drive over. The plaintiff drove up to the crossing, and when he was about on the first track, the flagman called to him to stop and moved his flag up close in front of the horse. The horse became frightened, backed, turned, upset the buggy, causing injuries to the plaintiff, and the horse and buggy. The reason the flagman had given the signal to stop, was that another freight train was approaching. *Held*, that under the evidence, the court was not justified in instructing a verdict for defendant, on the ground of plaintiff's contributory negligence, in that he should have seen the freight train approaching.

Same—Flagman—Employment—Common Crossing.—The tracks of three railroads were laid along a street in the city of C. The street was intersected by First, Second, and Third streets, and at each of these streets a flagman was stationed. Each company employed and paid a flagman at one of the crossings, who flagged all trains, whether upon the line of the company employing him, or upon the line of either of the other two companies. *Held*, that the company employing the flagman was responsible for his negligence, although such negligence happened when flagging the trains of another company.

APPEAL from District Court, Linn County.

This is an action to recover for a personal injury, and for damages to a horse and buggy, occasioned, as is alleged, by the negligence of a flagman at a street crossing of the track of the defendant's railroad and the tracks of the Chicago & Northwestern R. Co. and the Burlington, Cedar Rapids & Northern R. Co. There was a trial by jury. At the close of the introduction of the plaintiff's evidence a motion was made by de-

fendant' counsel to direct the jury to return a verdict for the defendant. The motion was sustained. The plaintiff appeals.

Henry Rickel for appellant.

Mills & Keeler for appellee.

ROTHROCK, J.—1. The material facts in the case are in substance as follows: The defendant, and the Chicago & Northwestern R. Co., and the Burlington, Cedar Rapids & Northern R. Co. all have railroad tracks on Fourth street, in the city of Cedar Rapids. The street, while not laid out with the cardinal points of the compass, may for the purposes of this opinion be said to run east and west. On the west side of the street are two tracks belonging to the Northwestern road; next is the track of the Burlington, Cedar Rapids & Northern road; and on the east side of the street is the track of the road of the defendant, the Chicago, Milwaukee & St. Paul R. Co. The four tracks practically occupy all of that part of the street which is between the sidewalks; that is, the street is not used to any extent for travel and traffic. These railroad tracks are used by all the trains of these roads. There are no other tracks upon which said companies run trains through the city. Fourth street is crossed at right angles by First, Second, Third, and other avenues. Owing to the great number of trains passing over these tracks, it became necessary some years ago to place flagmen at the crossings of First, Second, and Third avenues, in order to protect travellers upon those avenues from collisions with trains. The Burlington, Cedar Rapids & Northern Company employed a flagman at the First-Avenue crossing. The Chicago & Northwestern Company employed one at the Second-Avenue crossing, and the defendant employed one at Third avenue. The evidence shows that the flagman at Third Avenue was hired, his name carried on its pay-roll, and he was paid, by the defendant; and that he was placed there for the purpose of attending to the duty of flagman at that crossing for all the trains of said companies. In May, 1886, the plaintiff's wife and her mother were driving a single horse to a buggy along Third avenue, and approaching Fourth street from the west. The plaintiff's wife was holding the reins, and driving the horse. Before reaching Fourth street the plaintiff's wife observed that a freight train was standing on one of the railroad tracks. The train had been opened or parted to allow vehicles to cross, and it closed up and was coupled together and moved off. The horse was stopped about half a block away from Fourth street, to await an opportunity to pass over. Before the caboose at the end of the train entirely cleared the crossing, the flagman came round the end of the caboose, and signalled to the plaintiff's wife to drive over. The signal was made with a flag. The horse was driven

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up to the crossing, and, when he was about to the first track, the flagman called to the driver to stop, and moved his flag close up in front of the horse. The horse became very much frightened, and one witness testifies that the flagman seized hold of the bridle. A freight train was approaching from the east on the west track. The horse backed, and turned and upset the buggy, and ran away, injuring the driver and her mother, and the horse and buggy. The plaintiff's wife assigned to him her claim for the personal injury to her, and he seeks to recover damages for that, and for the injuries to the horse and buggy.

Several objections are made to the rulings of the court in excluding certain evidence offered by the plaintiff. These questions do not appear to us to demand extended consideration.

Rulings of court in excluding evidence.

The plaintiff's wife stated as a witness that the flagman moved his flag for her to come on. This statement was stricken out on motion of defendant. The objection to it was that it was incompetent, immaterial, and matter of opinion. But the witness was immediately allowed to state that she knew the signal to stop and go on, and that the flagman gave the signal to go on. That she was competent to give this evidence was apparent from the fact that she testified that she had been in the habit of crossing at this place every day, and sometimes five or six times a day. She also testified that the horse was "very much afraid of the cars ever since, and runs every time he sees one," and that she cannot drive the horse any more, and that she never had difficulty in driving him before. Counsel then asked her whether the horse had a disposition to frighten at trains before. An objection to this question was sustained. We think the question was proper, but the court may have been of opinion that the witness had already answered the question in substance. The same may be said of objections which were sustained to questions by which it was sought to show that, if the flagman had not stopped the horse and frightened him, there would have been ample time to have passed over the crossing without injury from the approaching train.

2. It is claimed by counsel for appellee that the court was justified in instructing the jury to find for the defendant upon the ground that the plaintiff's wife was guilty of contributory negligence. We do not think this position can be sustained. The ground upon which the claim is based is that she should have seen the approaching train, and stopped the horse before driving him upon the track. The evidence shows that she and her mother heard the ringing of the bell upon the approaching engine, and that her mother saw the train. There are two sufficient answers to this position of counsel: First. There was evidence which should

Plaintiff's wife not guilty of contributory negligence.

have been submitted to the jury, to the effect that, if the flagman had abided by his first signals to cross over, there would have been no injury. Indeed, the jury could not fairly have found that there was not ample time to make the crossing in safety if the flagman had not interfered, and frightened the horse. Second. No court would be justified in holding as matter of law that there could be no recovery because the driver did not stop before reaching the track. She did stop, and was bidden to go on; and, while she would not have been justified in rushing into a place of obvious danger, yet it was for the jury to determine whether she was justifiable in relying on the signal to cross over.

3. Counsel for appellant contends that the flagman was acting in the line of his duty in giving the signal to cross over, and in his efforts to stop the horse when he came up to the crossing. We think he is correct in this claim, and we do not understand that defendant's counsel disputes the general proposition that, if the flagman was guilty of negligence by reason of which the injury occurred, there can be a recovery as against some one. But it is insisted that, as the approaching train was a Northwestern train on one of the Northwestern tracks, the flagman was not performing any service for the defendant, but for the Northwestern Co. In other words, it is claimed that, if there was actionable negligence of the flagman in attending to his duty upon the approach of a train upon any of the tracks, the right of action is maintainable against the company owning the track, and operating the train thereon. Counsel for appellee base their argument on this point upon the following propositions, which we will state in their own language: "(1) That at the time and place of the accident the flagman was engaged in performing services and duties for the Chicago & Northwestern R. Co. alone, in which this defendant had no interest, and over which it had no control. (2) That in performing such duties and services, the flagman was then acting under the immediate and exclusive direction and control of the Chicago & Northwestern Co., who alone were responsible for his acts. He was their servant *ad hoc*. (3) That the service and duty to be performed by the flagman for the several railway companies was not one in which they were jointly interested, but was separate and distinct for each company. Defendant had no interest in or control over the tracks or trains of the Chicago & Northwestern R Co., or the flagging for that road." We do not understand counsel for appellant to combat these general propositions, but he claims that the evidence does not sustain them. As we have said, each of the three railroad companies employed a flagman,—one at First, one at Second, and one at Third avenue,—

Flagman—Employment—Common crossing.

and each flag-man performed the duty pertaining to his employment for all the trains on all the roads. The only witness who testified upon this question was the flagman, by whose alleged negligence the accident occurred. He was paid in full by the defendant company, and there is no evidence that any part of his wages were paid by either of the other companies. Upon the face of the record, as presented in the pleadings and evidence, the fair presumption would be that each of the companies paid the flagman whom it employed. The service does not appear to have been greater, nor more difficult, or to have required a man commanding higher wages, at one crossing than another. The flagman did not claim that he had any separate contract with each company. It is true, he persisted in stating as a witness, that at the time of the accident he was in the service of the Northwestern Company, and that, when a train approached upon the track of any of the roads, he flagged that train for that company; and that "lots of times" he talked with the agents of the Northwestern and Burlington, Cedar Rapids & Northwestern Cos. about flagging their trains. All the testimony he gave upon this point was in the nature of an argument. He gave no facts tending to show any employment by any one except that he was sent there by the defendant to do his work at that crossing, for which the defendant paid him; and his employment was to flag the crossing, no matter whose trains, nor upon what roads they were run. The idea that he was under the employment of one company for five minutes, and then another for a few minutes, and another for a short time, and that he changed his employers with the facility with which the kaleidoscope exhibits an array of colors, involves an absurdity. It can only be accepted upon the theory that one of these companies had one set of signals for flagmen, and the other a different kind, and that one required the signal to be given when another did not, and thus make their flag service not only the ridicule of the public, but a system of deception, to the great peril of the most prudent and careful drivers. As far as this record shows, the defendant was the proper party. The property in the different tracks and the owners of the trains do not enter into the question, so far as it appears in the evidence. There was evidence proper to be submitted to the jury that each of these companies were responsible for the flag service at the crossing where it employed, placed, and paid a flagman; and that they could not contract with the other in that manner cannot be questioned. And when the defendant thus undertook to guard and flag the crossing at Third avenue, it is, to say the least, primarily liable to the travelling public for the proper performance of that duty. We do not deem it necessary to cite authority in support of this proposition. As supporting it, how-

ever, see Kellogg *v.* Payne, 21 Iowa, 575. It will be understood that we are determining the question of the alleged negligence of a flagman, and not the negligence of employees operating a train on one of the tracks in said street. Reversed.

Contributory Negligence—Action at Crossing—Horses Taking Fright.—A person who undertakes to drive a team of horses, attached to a wagon, across a railroad crossing immediately in front of an engine that had temporarily stopped on the crossing, making the usual noises by the escaping steam, and who knows and appreciates the danger, cannot recover for injuries inflicted by the frightened team. Union Pacific R. Co. *v.* Hutchinson (Kan.), 18 Pac. Rep. 705.

Same—Unavoidable Accident.—A freight train broke in two, and the engineer, when he discovered it, gave the signal "down brakes" to the rear portion. Plaintiff's team was frightened by the unusual noise, and ran between the two sections, and was killed. There was no evidence that the train broke by the fault of the defendant, or its servants, nor was there evidence of any negligence in discovering the break or stopping the rear section. It was held that the killing of the team was an unavoidable accident for which no recovery could be had. Buster *v.* Humphreys, 34 Fed. Rep. 507.

Same—Province of Jury.—The evidence tended to show that the noise of a certain whistle from a locomotive engine was of an unusual character, and that plaintiff's horse was frightened by it; it was held that whether the sounding of the whistle was reasonably necessary and whether the defendant exercised reasonable care to prevent injury were questions for the jury. Walker *v.* Boston & Maine R. Co., 13 Atl. Rep. 649.

Frightening Horses at Crossing.—See, *ante*, Cleveland, C. C & I R. Co. *v.* Wynant, 328, and note, 333.

LAKE SHORE AND MICHIGAN SOUTHERN R. CO.

v.

PINCHIN.

(112 *Ind.* 592.)

Highway-crossing—Personal Injuries—Contributory Negligence.—If a person knows that a train of freight cars is stopping temporarily at a way station, on its way to its destination, and if he, for the purpose of crossing the track at a public highway, attempts to pass between the cars upon the draw-bars, he is, as matter of law, guilty of contributory negligence, which will preclude a recovery for personal injuries sustained while so doing, even though directed to so pass, by a brakeman.

Same—Special Findings.—If, in an action to recover damages for personal injuries, the jury find a fact in favor of the defendant which, as a matter of law, will preclude the plaintiff's recovery, judgment must be entered for the defendant, notwithstanding a general verdict for the plaintiff.

APPEAL from Circuit Court, De Kalb County.

Action to recover damages for personal injuries. The de-

fendant appeals from a judgment for the plaintiff. The opinion states the case.

J. I. Best, *Jas. A. S. Mitchell*, *Ashley Pond*, and *O. G. Getzedanner* for appellant.

Jas. E. Rose and *A. A. Chapin* for appellee.

ELLIOTT, J.—The facts found by the jury, in answer to interrogations, are substantially these: The appellee was injured while attempting to pass between two coal-cars forming part of a train standing across a street in the town of Butler. He knew that the train was a through freight, bound west, and on approaching the train he stopped to the south of it five or six feet, and stood there from five to eight minutes before he attempted to pass between the cars. He did not know that an engine was attached to the train; but he did not go towards the head of the train to see whether there was an engine attached. When the appellee got up between the cars, he stood on the draw-bars, and at the time he was injured "had his hands bracing himself between the cars." At the time he attempted to pass between the cars, he had an open pocket-knife and a cane in his hands, and was whittling a stick. The knife and stick were laid on the end of one of the cars when he got upon them. In his effort to pass between the cars, he raised his foot and "put or got it on the end of the draw-bars on which he had been standing." After he got up between the cars he picked up his knife, shut it up, and put it in his pocket. The cars were moving fast enough for him "to have noticed that the train was in motion, had he been giving attention to the movement." No notice was given by him of his intention to pass through the train to any of the trainmen, and none of them knew that he was going to make the attempt. A man could, by looking, have seen the engine of the train. The appellee knew, before he attempted to cross, that the train had broken in two. He would not have made the attempt "except for what a man he took to be a brakeman told him."

Facts.

There are cases where the court must, as a matter of law, declare that an act constitutes negligence. Where the facts are undisputed, and lead to but one inference, the question whether there was or was not negligence is a question of law. Railroad Co. *v.* Spencer, 98 Ind. 186. This is such a case. It must be affirmed, as matter of law, on the facts exhibited in the answers of the jury, that the appellee was guilty of negligence in attempting to pass between the cars, and in the manner in which he took to carry out the attempt. He knew the train was not to remain in the town, but was there on its trip westward, and he knew that it had broken in two; so that, even if he was not

Negligence of plaintiff in passing between cars.

negligent in making the attempt to cross, he was negligent in the manner in which he conducted himself in making his way between the cars. If it were conceded that he was without fault in endeavoring to pass through the train, still it must be held that he was negligent in not exercising a higher degree of care in effecting what no reasonable man could avoid knowing was a dangerous passage between the cars. He was burdened with things that interfered with his safely clambering through the train; he made no haste, but laid the things he had in his hands on the end of one of the cars, and, before leaving his dangerous position, picked them up and put one of them in his pocket. This was not such care as was required, even had he been crossing with permission of the railroad company, and without fault. It by no means follows that because a man may do an act that he may do it carelessly.

But we need not place our decision upon the ground that the manner in which the appellee attempted to cross between the cars made him guilty of contributory negligence, for he was guilty of negligence in making the attempt. There was therefore negligence in entering upon the act, as well as in the manner of performing it. A person who has knowledge that a train of cars is stopping temporarily at a way station, on its way to its destination, has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it. Owen *v.* Railroad Co., 35 N. Y. 518; Railroad Co. *v.* Copeland, 61 Ala. 376; Stillson *v.* Railroad Co., 67 Mo. 671; Lewis *v.* Railroad Co., 38 Md. 588; Holden *v.* Railroad Co., 30 U. C. C. P. 39. It will not avail the plaintiff that he was not fully aware of his danger; for a plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man. Railroad Co. *v.* Henderson, 43 Pa. St. 449; Railroad Co. *v.* Kendrick, 40 Miss. 374. A man must use his senses, and is not excused, where he fails to discover the danger, if he has made no attempt to employ the faculties nature has given him. 2 Wood R. Law, 1319, note 2; Railway Co. *v.* Goddard, 25 Ind. 200. One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence. But here the case is stronger, because the fact is that the appellee might have known, by observation or "by feeling," that the train was actually in motion when he attempted "to get down."

The fact that a plaintiff has knowledge of a danger that he will encounter if he pursues his way, does not always necessarily preclude a recovery, but it is in every case an important factor.

Railway Co. *v.* Brannagan, 75 Ind. 490; s. c., 5 Am. & Eng. R. R. Cas. 636, and cases cited; City *v.* Breen, 77 Ind. 29; Murphy *v.* City, 83 Ind. 76; Wilson *v.* Trafalgar, etc., Co., Ib. 326; Henry, etc., Co. *v.* Jackson, 86 Ind. 111; Nave *v.* Flack, 90 Ind. 205; Town *v.* Hetrick, Ib. 545; Board *v.* Dombke, 94 Ind. 72; City *v.* Hardy, 98 Ind. 577; City *v.* Cook, 99 Ind. 10; City *v.* Bitner, 100 Ind. 396; Beach Neg. 40–258. But the fact that the danger is known, or might be known by the exercise of the natural faculties, will preclude a recovery where it is immediate and of such a character as to impose, upon one who undertakes to pass the danger, a hazard that a prudent man would not incur. A man has no right to cast himself upon a known danger where the act subjects him to great peril. If there is a risk, apparent or known, that will probably result in injury, he must not encounter it. Railway Co. *v.* Brannagan, *supra*. It is to be determined, from the facts of the case, whether the known danger is likely to subject the plaintiff to injury; and if it is, then he must be held guilty of negligence in encountering it.

While, therefore, it cannot be held that one who does not go out of his way to avoid a known danger is not always guilty of contributory negligence, yet it must be held that he is guilty of negligence where he attempts to pass the danger, where there is such a probability of injury as would deter a reasonable man from assuming the risk of passing it. If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will preclude a recovery. Town of Gosport *v.* Evans, *ante*, 256 (October 13, 1887). In this case the risk of passing between a train of cars likely to get under way at any moment was such as no one could assume without being guilty of negligence. This is one of the cases where it must be declared, as matter of law, that the risk is so great that no one who has a knowledge of the danger has a right to assume it.

Same—Direction of brakeman.

The direction of a brakeman to a person, to pass through a train standing on a highway, will not justify him in attempting to pass between the cars where the danger is obvious. Even in the case of passengers, obedience to the directions of the conductor will not avail the passenger if the danger of obedience is plainly apparent. In that class of cases, as is well known, the passenger has much greater claims to protection than a traveller along a highway, and yet the overwhelming weight of authority is that the passenger cannot rely upon the conductor's directions where they would lead him into danger plainly open to observation. In the case of Cincinnati, etc., Co. *v.* Carper, *ante*, 122 (October 11, 1887), the authorities on this subject are collected; and it is unnecessary for us to again consider them.

One important fact found in favor of a defendant may sometimes entitle him to a judgment on the answers of the jury to special interrogatories. It is apparent, therefore, that a defendant may obtain a judgment with less difficulty than a plaintiff who has the burden of proof. Rice *v.* City of Evansville, 108 Ind. 7, and 58 Am. Rep. 22. In the present case these answers find, in favor of the defendant, the important facts that the plaintiff attempted to pass through the cars of a train which he knew might move in an instant after he got upon them, and that in the attempt he did not use due care. The question was presented, in a case very like the present in principle, upon answers to interrogatories, and it was held that the defendant was entifled to judgment on the answers. Thompson *v.* Railroad Co., 54 Ind. 197.

Special findings.

Judgment reversed and cause remanded, with instructions to enter judgment for the appellant on the answers to interrogatories.

MITCHELL, J., did not take part in the decision of this cause.

Injury Caused by Passing Between Stationary Cars. — See Nichols *v.* Washington, etc., R. Co. (Va.), 32 Am. & Eng. R. R. Cas. 27.

DAHLSTROM

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(*Missouri Supreme Court, June* 18, 1888.)

Highway Crossings—Obstruction—Personal Injuries—Trespass.—If a person who finds a highway crossing obstructed by a standing train proceeds along the track to a point at a distance of about one hundred feet from the crossing where an opening has been made in the train, and there attempts to cross the track, he is, in the absence of testimony to show that such opening was made for pedestrians to pass, or that it had ever been used for that purpose, a trespasser upon the track to whom the railroad company owes no duty except to avoid injuring him, if it could do so by the exercise of ordinary care after discovering his peril, or if it could by the exercise of ordinary care have discovered his peril in time to avoid injury.

Same—Instructions—Questions in Issue.—When such circumstances are revealed by the petition, it is error for the court to instruct the jury that plaintiff can recover, if injured by defendant's negligence at a place where the public are accustomed to cross the track while the plaintiff himself was in the exercise of ordinary care and prudence, such question not being put in issue by the pleadings.

Same—Trespasser—Duty of Company—Instruction.—In an action to recover damages for injuries to a person who trespassed upon defendant's track, an instruction that although the trespasser was run over and injured, "the company will be responsible if its employees could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness," is erroneous, in so far as it is not qualified by an addition to the following effect, "after discovering the danger or peril of the injured person on the track at the time, or if by the exercise of ordinary diligence his peril could have been discovered in time to have avoided injuring him."

APPEAL from St. Louis Circuit Court.

Action by John F. Dahlstrom against St. Louis, Iron Mountain & Southern R. Co. to recover damages for personal injuries sustained through the alleged negligence of defendant's servants. The defendant appeals from a judgment for the plaintiff. The court, among other instructions, gave the following: "(3.) If the jury believes from the evidence that the injury to plaintiff was caused by the negligence of defendant's servants, as charged in the declaration, and without any greater want of care on the part of plaintiff than was reasonably to be expected from a person of ordinary care and prudence in the situation in which he found himself placed, then the plaintiff is entitled to recover, and the verdict should be in his favor." The opinion states the facts and the other instructions excepted to.

Bennett Pike for appellant.

Pattison & Crane for appellee.

NORTON, C.J.—This is an action to recover damages for personal injuries alleged to have been occasioned by the negligent and careless management of defendant's engines and cars, in which plaintiff had judgment, from which defendant has appealed. It is alleged in the petition that plaintiff, "while in the act of crossing Main street, near Chouteau avenue, in the city of St. Louis, was run over and injured by defendant's engine and cars, through or on account of defendant negligently and carelessly managing said engine and cars, both by running at a greater rate of speed than was justifiable, by not having an employee on the ends of the train to warn pedestrians and keep a lookout, by not giving any warning of the approach of said engine and cars by sounding a bell or whistle, or otherwise, by obstructing the regular crossing for a great length of time, thereby compelling pedestrians to walk through and among moving and standing trains, and by not providing adequate means for the safe passage of pedestrians across a necessary and dangerous crossing." Plaintiff is the only witness who testified in regard to the way in which he was injured, and his evidence is to the following effect: That on the day he was injured he was going down Chouteau avenue to the levee, and that when he came to Main street where it crosses said avenue, the way was blocked

Facts.

with cars standing across it; that he turned south, and went about 100 yards down Main street, and, discovering an opening between the cars.—20 feet wide as stated in his examination in chief, and 50 feet wide as stated in his cross-examination,—that he undertook to cross Main street through said opening, and was struck and injured while doing so; that he kept a lookout, but heard no noise before he was struck and run over. There is nothing whatever in his evidence tending to show that the opening through which he attempted to go was either made by defendant for pedestrians to pass through, or that it was or ever had been used by pedestrians for that purpose, and in so using it plaintiff was a trespasser on defendant's track, and defendant owed him no duty except not to injure him, if after discovering his peril it could, by the exercise of ordinary care, have avoided injuring him, or could by the exercise of ordinary care have discovered his peril in time to have avoided injuring him. It is held in the case of Stillson *v.* Railroad Co., 67 Mo. 671, that where a street crossing is obstructed by a train of cars, and there is an opening in the train at a place some distance from the crossing, a person who attempts to pass through said opening does so at his peril, and that those in charge of the train are not required to ring the bell or sound the whistle, as this is only required in approaching a crossing. The following instructions were given over defendant's objections: "If the jury believe, from the evidence, that the injury to plaintiff occurred at a place where the public were accustomed to crossing the track of defendant; that plaintiff, while crossing the track, exercised ordinary care and prudence; and that, by reason of the want of proper and reasonable care on the part of the agents or servants of defendant in the management of the locomotive or cars, plaintiff was run over and injured, they will render a verdict in favor of plaintiff." (2) "The jury are instructed that, although a person may be improperly or unlawfully upon a railroad track, that alone will not discharge the company or its employees from the observance of reasonable care; and, if such person is run over by the train and killed or injured, the company will be responsible if its employees could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness."

Instructions.

The first instruction given is clearly erroneous, in this: that it submits to the jury a question not made by the petition, viz., that the injury to plaintiff occurred at a place where the public were accustomed to cross the track of defendant. The petition only charges that the place of injury was near the regular crossing, and the evidence of plaintiff shows that the place where he attempted to cross the tracks of defendant was a hundred feet south of the street crossing at a temporary opening made in the train of cars

Passing through opening not at highway.

standing on the track. And, besides this, there is not a particle of evidence in the record that the public was accustomed to cross the tracks of defendant where plaintiff attempted to cross. The instruction is also faulty in not confining the jury to the negligence alleged in the petition.

Duty to trespassers.

The second instruction is erroneous in not being qualified by the addition of the following: "after discovering the danger or peril of the injured person on the track at the time, or if, by the exercise of ordinary diligence, his peril could have been discovered in time to have avoided injuring him."

The third instruction given for plaintiff is also erroneous. It in effect told the jury to find for plaintiff if they found that the injury to plaintiff was caused by the negligence of defendant's servants, as charged in the petition, and that the plaintiff was not any more negligent at the time than a person of ordinary prudence and care would have been in a similar condition. For the errors noted the judgment is reversed, and cause remanded.

All concur, except RAY, J., absent.

Passing Through Train Standing Across Highway.—See, *ante*, Lake Shore & M. S. R. Co. *v.* Pinchin, 383, note, p. 387.

ERWIN

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(*Missouri Supreme Court, November* 12, 1888.)

Highway Crossing—Negligent Killing—Infant—Contributory Negligence—Instructions.—In an action to recover damages for negligently killing the plaintiff's son, a boy about eleven years of age, an instruction to the jury that in determining the case they must consider the age of the boy, and the fact that he did not have the discretion of an adult person, is erroneous, in so far as it does not direct the jury to consider how the deceased used his discretion, and is misleading in so far as the jury might infer from it that a boy of eleven years of age, not having the discretion of an adult person, could not be guilty of contributory negligence.

Same—Duty of Company—Instruction.—In an action to recover damages for negligently killing plaintiff's son, it appeared that the deceased and another boy came down hill upon a sled; that before reaching the railroad crossing the deceased's companion saw the train and threw himself upon the ground, but the deceased continued on the sled until it reached the track, where he was run over and killed. The accident happened at a public crossing. The defendant requested an instruction that unless the

employees in charge of the train failed to make use of the means and appliances in their power to prevent an accident, after they became aware of the danger deceased was in, or of the fact that he was riding down hill on a sled, the finding should be for defendant. *Held*, that such instruction was properly refused, being only applicable where the person injured was a trespasser upon the track and not to circumstances such as the present, where both the public and the company have a right to the use of the street.

APPEAL from St. Louis Circuit Court.

Action by Caroline Erwin against St. Louis Iron Mountain & Southern R. Co. to recover damages for negligently killing plaintiff's son. The defendant appeals from a judgment for the plaintiff. The opinion states the case.

Bennett Pike for appellant.

Henry Boemler for respondent.

BLACK, J.—A train of the defendant's cars, consisting of a locomotive and three freight cars, run over and killed the plaintiff's son, a lad between eleven and twelve years of age, in the corporate limits of the city of St Louis. Facts. This is a suit by the mother, the father being dead, to recover the statutory penalty of $5000. The cause of action stated in the petition is the negligent violation of ordinance No. 10,305, in this: that the train was moving at a greater rate of speed than six miles per hour; that the bell on the engine was not sounded; and that, though the train was backing, no man was stationed on the car at the end of the train furthest from the engine, to give danger signals. The defendant has a track running north and south on and along Front street, or the levee, as variously called in the record. Locust street runs east and west, and on this street, from Main street to the levee, a distance of about 250 feet, there is a steep down grade. At the time of the accident, the boy was coasting down this grade, and was run over by the foremost of the three freight cars, as they were being pushed northward on the track by an engine attached to the south end of the train. The evidence for the plaintiff, save that of one witness, tends to show that the train was moving at the rate of 8 to 12 miles an hour; that there was no man on the car furthest from the engine; and that the bell was not sounded. The plaintiff's evidence also shows that this and another boy were going down the hill at a very rapid rate; that the other boy was sitting upon his sled, and as soon as he saw the train, and just before he reached it, he threw himself off on the ground; that plaintiff's boy was lying down with his stomach on the sled, and just as he ran on the track the front car truck ran over him. The cross-examination of the engineer, who was called by the plaintiff, and the evidence of the fireman, the switch foreman, and a brakeman, all of whom were with the

train, is to the effect that the cars were moving at a rate of speed not exceeding three miles an hour, that the fireman was ringing the bell, and that there was a brakeman on the third car, the one furthest from the engine. These witnesses say there was snow and ice on the track, so that they could not go fast; and one of the witnesses says he was, at the time of the accident, walking on the track in advance of the train.

The first contention of the appellant is that an instruction asked at the close of the plaintiff's evidence, to the effect that the plaintiff could not recover, should have been given. The plaintiff insists that defendant waived this request by putting in its evidence, after its request for such an instruction had been made and overruled, took the chances of curing any defect in the plaintiff's evidence; but did not entirely waive its right to have the ruling of the court reviewed. This court, however, in reviewing the ruling of the trial court on such a question, looks to the entire evidence in the case, no matter by whom offered, nor whether the demurrer to the evidence was interposed at the close of the plaintiff's evidence in chief, or at the close of all of the evidence. It is in this sense the same question is spoken of in Bowen *v.* Railroad Co., 95 Mo. 275, and in Guenther *v.* Railroad Co., 95 Mo. 289; s. c., 34 Am. & Eng. R. R. Cas. 47. The evidence of the defendant's employees in charge of the train is all to the effect that there was no violation of the ordinance; and since they must have known what they were doing, and were in a position to judge of the rate of the speed of the train, the evidence does seem to preponderate in favor of the defendant; but there was much evidence of a contrary character offered by the plaintiff, and the law is well settled and understood that this court cannot settle disputed questions of fact on conflicting evidence. That is a matter for the triers of fact.

Motion for nonsuit—Review of evidence.

If the freight train was running at a greater rate of speed than six miles per hour, or the bell was not ringing, or there was no man on the car farthest from the engine, then the defendant was guilty of negligence. A violation of the ordinance is, as we have often said, negligence *per se*. Keim *v.* Railroad Co., 90 Mo. 314, and cases cited. Here the train was moving on and along a public highway; and persons on the street have a right to presume that the company will obey the commands of the ordinance, and to act upon the presumption. A violation of this ordinance, under such circumstances, is gross negligence. The evidence shows that the engineer could not see up Locust street, by reason of the buildings on that and Front street, until he got close to the intersection of the two streets; and doubtless the same is true as to the person required to be stationed on the train, and hence the

Excessive speed—Negligence per se.

necessity of giving full obedience to the ordinance. For like reasons, persons going down Locust street should use care proportionate to the dangers to be encountered.

Contributory negligence of boy.

The further question, then, is, on the demurrer to the evidence, whether the boy was guilty of negligence directly contributing to his death. That it would be negligence on the part of a person of mature years and discretion to thus go headlong into a place surrounded with so much danger, is clear enough; but it cannot be said, as a matter of law, that the plaintiff must fail because of the conduct on the part of the boy. The care which is required of him is that care proportionate to his age and capacity. In other words, the law requires of him, and only requires him to use, that care and caution which may be reasonably and fairly expected of a boy of his age and capacity; and whether he did use that care or not, is a question for the jury to determine. It is important, in this connection, to examine the instructions of the court on this point. That given at the request of the plaintiff is as follows: "The court instructs the jury that, in considering the question as to whether or not plaintiff's deceased son contributed by his own act to cause the injury to him mentioned in the petition, they should take into consideration his age and discretion; and if the jury find, from the evidence, that he was of the age of eleven and one half years, and did not possess the discretion of an adult or grown person at the time of the accident, then the jury should consider the fact in determining whether or not he was guilty of contributory negligence, at the time of said accident, that contributed to the cause of said accident." Beyond all doubt, it was the duty of the jury to consider the age of the boy and the fact that he did not have the discretion of an adult person; but this does not go far enough. It furnishes no guide for the jurors at all. The question is, not only one of the age and capacity of the boy, but it is equally important to know how he used that capacity; and as to this the instruction gives no direction. While the instruction does not in terms say that, being a boy but eleven and a half years old, and not having the discretion of an adult person, he could not be guilty of contributory negligence, yet it comes very near to it. The instruction is misleading, and does not present a fair statement of the law. This question of negligence on the part of the boy, contributing to his death, is one of vital importance in this case, and it ought to be fairly presented. Under the undisputed facts in the case, the plaintiff ought not to recover until there is a clear finding that this boy, at the time of the accident, was using the care and caution which might be expected of one of his age and capacity. Again, error is assigned because the court refused to give an instruction, re-

quested by the defendant, to the effect that, unless the employees of defendant in charge of the train failed to make use of the means and appliances in their power to prevent the accident, after they became aware of the danger he was in, or of the fact that he was riding down the street on his sled, the finding should be for the defendant. Such an instruction will be proper enough where the person injured is a trespasser on a railroad track, and the circumstances are such that the company has both a right to have and a right to anticipate a clear track; but the principle has no application to a case like this. Rine *v.* Railroad Co., 88 Mo. 392; s. c., 25 Am. & Eng. R. R. Cas. 545; Keim *v.* Railroad Co., 90 Mo. 314; Williams *v.* Railroad Co., 9 S. W. Rep. 573 (opinion just filed). Here both the company and the public have a right to the use of the street. The company must know that persons will be and have a right to be upon the street; and hence a duty arises to obey these reasonable municipal regulations, and to keep watch to avoid collisions and accidents. The duty of the company to look out for persons on the track is just as great as the duty of the individual to look out for trains; the difference being that the person must give way to the train, which in the nature of things, cannot be stopped instantly. For the error before stated, the judgment is reversed and the cause remanded.

RAY, J., absent. The other judges concur.

Contributory Negligence of Infants.—The same care and discretion is not required of a child in crossing a railway track on a public highway, that is exacted of a grown person. Dowling *v.* N. Y. R. Co., 90 N. Y. 670; s. c., 12 Am. & Eng. R. R. Cas. 73; Thurber *v.* Harlem R. Co., 60 N. Y. 326; O'Mara *v.* H. R. Co., 38 N. Y. 449; Sheridan *v.* Brooklyn R. Co., 36 N. Y. 43. The rule that a person approaching a railroad must stop, look, and listen, and, if injured by a failure to do so, does not apply in the case of infants of tender years. Chicago R. Co. *v.* Becker, 84 Ill. 483; Elkins *v.* Boston R. Co., 115 Mass. 190; Schwier *v.* N. Y. R. Co., 90 N. Y. 538; s. c., 14 Am. & Eng. R. R. Cas. 656; Hacrofft *v.* St. L. S. & M. R. Co., 2 Hun (N. Y.), 489; s. c. aff'd, 64 N. Y. 636. See Mobile & M. R. Co. *v.* Crenshaw, 65 Ala. 567; s. c., 8 Am. & Eng. R. R. Cas. 340; Nehrbas *v.* Cent. Pac. R. Co., 62 Cal. 329; s. c., 14 Am. & Eng. R. R. Cas. 670; Chicago R. Co. *v.* Murray, 71 Ill. 601; Paducah R. Co. *v.* Hoche, 12 Bush (Ky), 41; Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475; Boland *v.* Mo. R. Co., 36 Mo. 484; Wendell *v.* N. Y. Cent. & H. R. R. Co., 91 N. Y. 420; s. c., 14 Am. & Eng. R. R. Cas. 663; McGovern *v.* N. Y. R. Co., 67 N. Y. 417; Costello *v.* Syracuse R. Co., 6 Barb. (N. Y.) 92; Philadelphia R. Co. *v.* Spearen, 47 Pa. St. 300; Warner *v.* R. R. Co., 6 Phila. (Pa.) 537; Johnson *v.* Chicago & N. W. R. Co., 59 Wis. 529; s. c., 1 Am. & Eng. R. R. Cas. 155; Haas *v.* Chicago, etc., R. Co., 41 Wis. 44.

What would be contributory negligence in a man might not be in a child. Nehrbas *v.* Cent. R. Co., 62 Cal. 320; s. c., 14 Am. & Eng. R. R. Cas. 370; Moore *v.* Metropolitan R. Co., 2 Mackey (D. C.), 437; Meeks *v.* South. Pac. R. Co., 56 N. Y. 513; s. c., 38 Am. Rep. 67. Conduct which on the part of a person of full age and ordinary capacity would be held contributory negligence as a matter of law, might be ordinary care in a

child of tender years, because the standard of care varies according to age and capacity. Dowling *v.* Allen, 88 Mo. 292.

Same—The Question of Care to be Required of a Child is ordinarily to be determined by the jury, in accordance with what a child of similar age and experience similarly situated would have done. See Nehrbas *v.* Cent. Pac. R. Co., 62 Cal. 420; s. c., 14 Am. & Eng. R. R. Cas. 370; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.), 41; O'Conner *v.* Boston R. Co., 135 Mass. 352; s. c., 15 Am. & Eng. R. R. Cas. 362; Barry *v.* N. Y. R. Co., 92 N. Y. 289; s. c., 13 Am. & Eng. R. R. Cas. 615; Dowling *v.* N. Y. Cent. R. Co., 90 N. Y. 670; s. c., 12 Am. & Eng. R. R. Cas. 73. See also 4 Am. & Eng. Encycl. L., tit. Contributory Negligence, 22, pp. 42-46.

Children so Young as to be Non Sui Juris cannot be guilty of contributory negligence. Bay Shore R. R. Co. *v.* Harris, 67 Ala. 6; Meeks *v.* Southern & R. R. Co., 52 Cal. 602; Evansville R. R. Co. *v.* Wolf, 59 Ind. 89; Gavin *v.* City of Chicago, 97 Ill. 66; Toledo R. R. Co. *v.* Grable, 88 Ill. 441; Chicago *v.* Starr's Adm'r, 42 Ill. 174; Jeffersonville R. R. Co. *v.* Bowen, 40 Ind. 545; Lafayette R. R. Co. *v.* Huffman, 28 Ind. 287; Pittsburg & R. R. Co. *v.* Vining, 27 Ind. 513; Smith *v.* Atchison R. Co., 25 Kan. 738; s. c., 4 Am. & Eng. R. R. Cas. 554; McLain *v.* Van Zandt, 48 How. (N. Y.) Pr. 80; McGreary *v.* East & C. R. R. Co., 135 Mass. 363; s. c., 15 Am. & Eng. R. R. Cas. 467; Callahan *v.* Bean, 91 Mass. (9 Allen) 401; Frick *v.* St. Louis & R. R. Co., 75 Mo. 542, 595; Donohoe *v.* Wabash & St. L. R. Co., 83 Mo. 560; s. c., 53 Am. Rep. 594, 597; O'Flaherty *v.* Union R. Co., 45 Mo. 70; Mascheck *v.* St. L. R. Co., 2 Am. & Eng. R. R. Cas. 38; Ihl *v.* Forty-seventh & G. St. Ferry R. Co., 47 N. Y. 317; s. c., 4 Am. Rep. 450; McGary *v.* Loomis, 63 N. Y. 104; s. c., 20 Am. Rep. 510; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455; Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234; Pittsburg & R. R. Co. *v.* Caldwell, 74 Pa. St. 421; Northern Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Morgan *v.* Bridge Co., 5 Dill. C. C. 96; Kreig *v.* Wells, 1 E. D. Smith (N. Y.), 76; Frick *v.* St. Louis R. Co., 75 Mo. 595; s. c., 8 Am. & Eng. R. R. Cas. 280; 10 Am. & Eng. R. R. Cas. 780.

Whether Children are Non Sui Juris is held by many cases to be a matter of law. Schmidt *v.* Milwaukee & C. R. Co, 23 Wis. 186; Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234; Gaven *v.* Chicago, 79 Ill. 66; Northern Pac. R. *v.* Mahoy, 57 Pa. St. 187; McCarry *v.* Loomis, 62 N. Y. 104; s. c., 20 Am. Rep. 510; Jeffersonville & R. Co. *v.* Bowen, 40 N. Y. 545; Pittsburg R. Co. *v.* Caldwell, 74 Pa. St. 421; Mascheck R. Co. *v.* St. Louis R. Co. 3 Mo. App. 600; s. c., 71 Mo. 276; 2 Am. & Eng. R. R. Cas. 38; Lafayette R. R. Co. *v.* Huffman, 28 Ind. 28; Evansville & R. Co. *v.* Wolf, 50 Ind. 99; Callahan *v.* Dane, 91 Mass. (9 Allen) 401; Wright *v.* Malden R. Co., 88 Ill. 441; Hartfield *v.* Roper, 21 Wend. (N. Y.) 615; s. c., 34 Am. Dec. 273; O'Flaherty *v.* Union R. Co., 45 Mo. 70; Manigane *v.* Brooklyn R. Co., 38 N. Y. 455; s. c., 36 Barb. (N. Y.) 230; Kreig *v.* Wells, 1 E. D. Smith (N. Y.), 76; Bay Shore R. Co. *v.* Harris, 67 Ala. 6; Morgan *v.* Illinois & St. L. B. Co., 5 Dill. C. C. 96; McGreary *v.* Eastern R. Co., 135 Mass. 363; s. c., 15 Am. & Eng. R. R. Cas. 407; Texas R. Co. *v.* O'Donnell, 58 Tex. 27; s. c., 10 Am. & Eng. R. R. Cas. 712; Chicago *v.* Starr's Adm'r, 40 Ill. 147; Weeks *v.* Southern Pac. Co., 52 Cal. 604; Pittsburg, etc., R. Co. *v.* Vining, 27 Ind. 573; Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455; Chicago *v.* Hesing, 83 Ill. 204; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Central Trust Co. *v.* Wabash R. Co., 31 Fed. Rep. 246.

A Child Seven Years of Age or Upwards is supposed to be capable of taking ordinary care of himself. See Gillespie *v.* McLowan, 108 Pa. St. 104; McMahon *v.* New York, 33 N. Y. 642; Atchenhagen *v.* Watertown, 18 Wis. 331; Plumley *v.* Birge, 124 Mass. 57; s. c., 26 Am. Rep. 645; Rockford, R. I. & St. L. R. Co. *v.* Delaney, 82 Ill. 198; s. c., 25 Am. Rep. 308;

Naghey *v.* Alleghany R. Co., 88 Pa. St. 85; s. c., 32 Am. Rep. 415; *Compare* Hestonville Pass. R. Co. *v.* Connell, 88 Pa. St. 520; s. c., 32 Am. Rep. 472.

Same—Capacity and Degree of Care.—Where there was a question as to whether the child was of sufficient age and discretion to be capable of some care for his own safety, the question of his capacity and its degree is for the jury. Honegsberger *v.* Second Ave. R. Co., 1 Keyes (N. Y.), 570; s. c., 33 How. (N. Y.) Pr. 195; 2 Abb. App. Dec. (N. Y.) 378; Lovett *v.* Salem R. Co., 91 Mass. (9 Allen) 557; Karr *v.* Parks, 40 Cal. 188; Drew *v.* Sixth Ave. R. Co., 26 N. Y. 49; Oldfield *v.* Harlem R. Co., 14 N. Y. 310; s. c., 3 E. D. Smith (N. Y.), 103; Cosgrove *v.* Ogden, 49 N. Y. 255; Barksdull *v.* New Orleans R. Co., 23 La. Ann. 180; Karr *v.* Parks, 40 Cal. 188; Lynch *v.* Smith, 104 Mass. 53; St. Paul *v.* Kuby, 8 Minn. 154; Mulligan *v.* Curtis, 100 Mass. 512; Chicago R. Co. *v.* Becker, 76 Ill. 26; s. c., 84 Ill. 483; Washington & G. R. Co. *v.* Gladmon, 82 U. S. (15 Wall.) 401; bk., 21 L. ed. 114; Kansas Cent. R. Co. *v.* Fitzsims, 22 Kan. 686; s. c., 31 Am. Rep. 203; Keefe *v.* Milwaukee & St. P. R Co., 21 Minn. 207; s. c., 18 Am. Rep. 393. *Compare* St. Louis R. Co. *v.* Bell, 81 Ill. 72; 25 Am. Rep. 269; Kerr *v.* Forgue, 54 Ill. 282; s. c., 5 Am. Rep. 146.

There are cases where children have been held guilty of contributory negligence as a matter of law. Wendell *v.* New York, etc., Co., 91 N. Y. 430; s. c., 14 Am. & Eng. R. R. Cas. 663; Moore *v.* Pa. R. Co., 99 Pa. St. 301; s. c., 4 Am. & Eng. R. R. Cas. 569; Nagle *v.* Alliston R. Co., 88 Pa. St. 35; s. c., 32 Am. Rep. 413; Dietrich *v.* Balto. R. Co., 58 Md. 347; s. c., 11 Am. & Eng. R. R. Cas. 115. *Compare* Hacrofft *v.* Lake Shore, etc., R. Co., 64 N. Y. 636.

In such cases a child's capacity for exercising care is to be determined by the same standard that would be applied in ascertaining its capacity to commit crime. Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198; s. c., 25 Am. Rep. 308; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 32; West Phila., etc., R. Co. *v.* Gallagher, 108 Pa. St. 504; s. c., 27 Am. & Eng. R. R. Cas. 204.

KELLY

v.

UNION RAILWAY AND TRANSIT CO.

(*Missouri Supreme Court, April* 6, 1888.)

Highway-crossing — Negligence — Personal Injuries — Demurrer to Evidence.—In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, if the evidence upon the question whether the bell was rung while approaching a crossing, or a man standing on the car farthest from the engine to give danger signals while the train was being backed, is conflicting, an instruction in the nature of a demurrer to the evidence interposed by the defendant, is properly overruled.

Same—Duty of Company—Contributory Negligence.—Although a person who is rightfully upon a track may be guilty of contributory negligence in failing to look out for the approach of cars, the company is nevertheless liable if by the exercise of ordinary care, after the discovery by the

company's servants of the danger in which such persons stood, the accident could have been prevented or if the company failed to discover the danger through the negligence or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and avoided the injury; and an instruction to that effect is properly given.

Same—City Ordinance — Evidence.—Where a track-repairer is injured within the limits of a city, an ordinance limiting the speed of trains in the city to six miles an hour, and requiring that the bell should be rung continuously while moving, and that in backing a train a man should be stationed upon the car farthest from the locomotive to give danger signals, is properly admitted in evidence.

ON certificate from St. Louis Court of Appeals.

Action by James Kelly against the Union Railway & Transit Co., to recover damages for personal injuries alleged to have been caused by the negligence of defendant's employees. The plaintiff was a track-repairer in the employ of the Missouri Pacific R. Co., and was injured while working upon tracks of defendant where they connected with the tracks of his employer. A verdict for the plaintiff for $2000 was rendered, and judgment entered thereon. The court of appeals certified the case for the opinion of the supreme court.

A. R. Taylor for appellant.

S. M. Breckenridge and *M. F. Watts* for respondent.

NORTON, C.J.—This cause was tried in the circuit court of the city of St. Louis, and defendant took an appeal from a judgment rendered in plaintiff's favor for $2000, to the St. Louis court of appeals, which court rendered a majority opinion affirming the judgment. Judge Rombauer rendered a dissenting opinion, in which he took the grounds that the majority opinion was in conflict with a decision of this court, whereupon the cause was certified to this court, as required by section 6 of the constitutional amendment adopted in 1884. Defendant interposed an instruction in the nature of a demurrer to the evidence, which was overruled, and this action of the court is assigned for error. As stated by the court of appeals, the evidence of plaintiff shows the following state of facts: "That plaintiff, who was an experienced track-repairer, was engaged, about noon of a cold winter day, in screwing, by means of bolts, a fish-plate to a T rail for the purpose of making a connection between a track of the Missouri Pacific R. Co. and that of the defendant company; that, for the purpose of prosecuting the work more conveniently, he took a position astride of a rail of the defendant's track, with his back towards the northeast; that the place where he was at work was between the Union depot, at Twelfth street, in St. Louis, and the mouth of the tunnel at Eighth street; that there were many tracks in the vicinity, and trains

Case stated.

Facts.

were constantly being made up in that vicinity, and cars and locomotives were frequently passing over the track when he was at work; that, while he was in a stooping position, a train of defendant, containing five or six cars, came backing along out of the mouth of the tunnel from the northeast at a lawful rate of speed, about four miles an hour, but without observing the precaution of ringing the bell of the locomotive and of having a man posted on the car farthest from the locomotive to give danger signals, as required by an ordinance of the city; that the plaintiff, absorbed in his work, and relying upon hearing the bell or a danger signal from the man so stationed, did not hear the train, as it thus approached him from behind, until the foremost car had almost reached him; that he turned and looked up, but not in time to avoid being struck by the car on the head, and knocked over in such a position that one of his feet was run over by one or more wheels of the car, and crushed so that his leg had to be amputated below the knee. The evidence shows that plaintiff was not a trespasser on defendant's track, but was rightfully there, in the performance of a duty assigned to him as track-repairer.

The evidence as to whether the bell was rung or a man was stationed on the car furthest from the engine to give danger signals was conflicting; but it was for the jury, and is not for us, to reconcile this conflict, or to say whether the evidence preponderated one way or the other. This is especially so in passing upon the demurrer to the evidence; the rule being, in such cases, that it admits the truth of the facts in evidence, and all reasonable inferences in plaintiff's favor which can be drawn therefrom. Giving effect to this rule, the action of the trial court in refusing to take the case from the jury was proper.

Demurrer to evidence—Conflict.

It is next insisted that the court erred in the matter of instructions. The court gave five of its own motion, one at the instance of defendant, and refused fourteen. The following shows the theory upon which the case was tried, the correctness of which is challenged by counsel for defendant: "(1) The jury are instructed that, at the time and immediately before plaintiff was injured (as shown by the evidence), he was negligent in failing to exercise ordinary care to observe the approach of the train that struck him; consequently the jury should return a verdict in favor of the defendant, unless they find the facts to be as set forth in the instruction number two or instruction number three. (2) It will be the duty of the jury to return a verdict in favor of the plaintiff if they find from the evidence that no man was stationed on defendant's said train on the car furthest from the engine; that, in consequence of such omission, plaintiff was not warned of the approach of

Instructions given.

said train in season to escape injury; and that, notwithstanding the said negligence of plaintiff in the premises, said injury would not have occurred if such a man had been so stationed on defendant's said train, and had exercised ordinary care to warn plaintiff of danger after he discovered (or by the exercise of ordinary care on his part could have discovered) the plaintiff was not observing the near approach of said train, and was in imminent danger of being struck by it. (3) If the jury find from the evidence that a man was stationed on defendant's said train on the car furthest from the engine; that he failed to make any outcry or warning of danger after he could have discovered, by the exercise of ordinary care on his part, that plaintiff was not observing the near approach of said train, and was in imminent danger of being struck by it; and that, in consequence of such failure, the plaintiff was injured,—then it will be the duty of the jury to return a verdict for plaintiff. (4) The jury are instructed that 'ordinary care,' as mentioned in these instructions, depends on the circumstances and facts of each particular case or situation with reference to which that term is used. It is such care as a person of ordinary prudence and caution would usually exercise in the same situation and circumstances. The jury are further cautioned that all the instructions given to them in this cause are to be considered together, and as explanatory of each other, excepting No. six (6), which is only to be considered in event the jury decide to render a verdict for the plaintiff under the other instructions given." It is argued that said instructions are erroneous, because they authorize a recovery for plaintiff, notwithstanding his negligence, if the defendant either knew, or by the exercise of ordinary care could have known, the danger in which plaintiff had placed himself in time to have avoided injuring him, and failed to exercise such care. This contention is not well founded. When a plaintiff is guilty of contributory negligence, the company is nevertheless liable if, by the exercise of ordinary care, after a discovery by defendant of the danger in which plaintiff stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger, and averted the calamity or injury. The principle here stated has been distinctly announced in the following cases: Maher *v.* Railroad Co., 64 Mo. 267; Kelley *v.* Railroad Co., 75 Mo. 138; s. c., 13 Am. & Eng. R. R. Cas. 638; Frick *v.* Railway Co., Id. 595; Harlan *v.* Railroad Co., 65 Mo. 22; Scoville *v.* Railroad Co., 81 Mo. 434, 440; Welsh *v.* Railroad Co., Id. 466; Bergman *v.* Railroad Co., 88 Mo. 678; s. c., 28 Am. & Eng. R. R. Cas. 588; Donohue *v.* Railroad Co., 91 Mo. 357; s. c., 28 Am. & Eng. R. R.

Liability notwithstanding contributory negligence.

Cas. 673; Rine *v.* Railroad Co., 88 Mo. 392; s. c., 25 Am. & Eng. R. R. Cas. 545. This last case expressly recognizes the correctness of the rule announced in the cases of Kelley *v.* Railroad Co., *supra*, and Frick *v.* Railroad Co., *supra*. As said by the court of appeals: "The above rule is humane, conservative of human life, and consonant with public policy. It is based upon the recognition of the fact that human beings may be and frequently are lawfully upon railway tracks, not only on highway crossings, but at other places; that in such situations they may remain unmindful of an approaching train, and thus lose their lives, or sustain great bodily injury, if those in charge of the train do not give some warning of its approach. It also proceeds upon a recognition of the fact that a railway train or locomotive is an instrument of danger to those who may happen to be on the track when its wheels are in motion; that those in charge of this instrument of danger ought, not only for the safety of persons who may happen to be on the track, but also for the safety of persons who may be on the train, to keep a constant lookout in front of the train when in motion; that this is a constant and continuing duty of an imperative character, especially when it is imposed, as in this case it is, by an ordinance of the city; and that, if a discharge of this duty would have prevented the injury to a person negligently on the track, the company is liable in damages for hurting such person, notwithstanding his negligence."

City ordinance —Evidence.

The court properly admitted in evidence an ordinance of the city of St. Louis to the effect that the speed of railroads in the city should be limited to six miles an hour; that the bell of the locomotive should be rung continuously while moving a train; and that, in backing a train, a man should be stationed on the car furthest from the locomotive to give danger signals. Merz *v.* Railroad Co., 13 Mo. App. 589; s. c., 88 Mo. 672; 26 Am. & Eng. R. R. Cas. 537, and 14 Mo. App. 459.

We see nothing in the record justifying an interference with the judgment, and it is hereby affirmed.

All concur.

Liability for Injuries Notwithstanding Contributory Negligence.—See Hays *v.* Gainesville, S. & R. Co. (Texas), and note, 34 Am. & Eng. R. R. Cas. 97, 102.

McWILLIAMS

v.

PHILADELPHIA AND READING R. CO.

(*Pennsylvania Supreme Court, October* 1, 1888.)

Highway-crossing—Personal Injuries—Nonsuit—Province of Jury.—In an action to recover damages for personal injuries, it appeared that plaintiff was familiar with the dangerous character of the crossing at which he was injured; that he stopped about thirty feet from the track, looked down the track and listened, but did not look up the track because at the place at which he has stopped he could not see along it; that he looked at his watch to see if any train was due, and that, finding none, he drove upon the track. He was struck by an irregular train which approached at a high rate of speed and without any warning. *Held*, that it was error to direct a compulsory nonsuit, and that the question of defendant's liability ought to have been left to the jury.

ERROR to Court of Common Pleas, Northumberland County.

Action by John S. McWilliams against George de B. Keim and another, receivers of the Philadelphia & Reading R. Co., to recover damages for personal injuries alleged to have been caused through the negligence of defendant's employees. At the trial the court, after the introduction of plaintiff's evidence, entered a compulsory nonsuit. The plaintiff moved to take the nonsuit, but the motion was overruled. The following is the opinion rendered upon the refusal of the motion.

CUMMIN, P.J.—"The plaintiff testified that he was familiar with the dangerous character of this road-crossing; that he had crossed it hundreds of times. As he approached the crossing the day of the accident, he was conscious of his danger. He said to his wife, who was in the buggy with him, 'This is the most dangerous crossing that the railroad company has, and I expect some day to hear tell of somebody being killed here.' He stopped at a point about thirty feet from the track, looked down the track and listened. He did not look up the track, because at the place he stopped he could not see up the track. He looked at his watch to see if any train was due. Finding no train was due, and hearing none, he drove on the track. His horse was struck by the engine of the gravel train, the buggy was upset, and he was injured. The plaintiff was driving a gentle horse, who would not scare. He did not look in the direction the train came from, and took no precautions whatever to

ascertain whether there was a train coming in that direction. His surveyor testified that at the point of crossing a person could see up the track three hundred and fifty-five feet, and at a point eight feet from the track a person could see up the track a distance of four hundred feet. And now, after a more careful examination of the evidence, and the law as laid down in Railroad Co. *v.* Beale, 73 Pa. St. 504; Railroad Co. *v.* Feller, 84 Pa. St. 226; Railroad Co. *v.* Ritchie, 102 Pa. St. 425; and Allen *v.* Railroad Co., 12 Atl. Rep. 493, I discover no reason to change the order made on the trial. Motion to take off nonsuit is overruled." Plaintiff brings error to review this decision.

P. A. Mahon and *C. R. Savidge* for plaintiff in error.

L. H. Kase and *S. P. Wolverton* for defendants in error.

STERRETT, J.—In any view that can be taken of the evidence in this case, it is clearly insufficient to warrant a judgment of nonsuit. Instead of establishing the fact of contributory negligence, of which the judgment is predicated, the evidence tends rather to prove that plaintiff exercised all the care and precaution, in approaching the railroad crossing, that could be reasonably required of any one under the circumstances; and, if it had been submitted to the jury, they doubtless would have so found; but, whether they would or not, the case was clearly for the jury, and not for the court. Assuming the evidence to be true, it makes out a case of negligence, on the part of those in charge of the irregular train, in approaching an admittedly dangerous crossing at a high rate of speed, and without any warning whatever. Judgment reversed, and *procedendo* awarded.

Accident at Crossing—Contributory Negligence—Province of Jury.—In Thompson *v.* New York Cent. & H. R. R. Co., 110 N. Y. 636, the plaintiff sued to recover damages for the negligent killing of his horses. The driver of the horses testified that he looked up and down the track when he came within a hundred feet of it, and saw nothing to prevent his crossing, and when within sixty feet he looked again both ways and still saw nothing. Approaching somewhat nearer, he looked a third time in one direction and still saw nothing, and was in the act of looking in the other direction when his attention was for a moment diverted towards a boy in front of his horses and moving recklessly towards him. When his horses' heads were about four feet from the track he heard the whistle of an engine, and saw the train three or four feet distant. His horses were in motion, and so near the track that he could not stop them until they got onto the track; and before he could get them off the engine struck them and they were instantly killed. *Held*, that although defendant company's servants might have given the signals required by law, the facts of the case were such as to require the court to submit to the jury both the question of the defendant's negligence and the question of the driver's contributory negligence. The court declared that the giving of the signals required by law does not, under all circumstances, render the railroad company free from negligence if they run their train at an undue, and

what might be found to be an improper and highly dangerous rate of speed through a village more or less populated.

In Blaiser *v.* New York, L. E. & W. R. Co., 110 N. Y. 638, the plaintiff, a man of sixty-five years of age, on his way home after dark, started to cross the defendant company's tracks. A switch train backed across the highway upon the far track. The plaintiff looked both ways before stepping upon the crossing, and saw no other train; there was no flagman. He had crossed four out of the seven tracks of defendant's railroad, when his progress was arrested by the switch train. He stood there waiting a moment for the switch train to move, when he was struck by an engine which gave no warning of its approach, and which had no headlight, and the employees in charge of which omitted to observe all the statutory requirements as to the running of trains when approaching crossings. At the time of the accident the plaintiff could see one hundred feet in the direction from which the engine came. The trial court directed a nonsuit. *Held*, on appeal, that contributory negligence could not, as a matter of law, be asserted of the plaintiff's conduct upon the facts disclosed, and that the nonsuit was therefore improper.

In Northern Pac. R. Co. *v.* Holmes (Wash. Tr.), 18 Pac. Rep. 76, the plaintiff was injured at a crossing within the switch yard of the defendant company. The jury found that the plaintiff was in the habit of using the crossing, and knew that the defendant was accustomed to switch trains upon its track at that point. The crossing was the only means of access from one part of the town to the other; the evidence showed that plaintiff (so far as he could see the switching train that injured him, his view being partly obstructed by other cars) saw it move away from the crossing; that the engine bell was not ringing continuously; and that this train was passing back and forth over the crossing almost continuously, and that plaintiff, after coming within fifteen feet of the track, could not have stopped his team with safety. The court *held*, that defendant's failure to stop, look, and listen before driving across the track did not, in itself, constitute such contributory negligence as would justify directing a verdict for the defendant.

In an action to recover damages for negligently killing the plaintiff's intestate, it appeared that the plaintiff walked upon a crossing; that about twenty feet from the track a person could see along the railroad for about a block, and a few steps more he could see along the track for a long distance. The train which killed the intestate had a blazing headlight, which lighted the track for at least a block. The evidence did not disclose whether any bell was rung or not, the witnesses all stating that they did not notice any bell. The train was running at least twenty miles an hour, six miles an hour being the limit of speed fixed by the city ordinance. The night was dark and rainy, and the plaintiff carried an umbrella. *Held*, that under the evidence the inevitable conclusion was that the deceased failed to stop and look along the track, or, if he did look, took his chances to get across when he ought, as a prudent man, to have stopped; and that a verdict was properly directed for the defendant. Kwiotkowski *v.* Chicago & G. T. R. Co. (Mich.), 38 N. W. Rep. 463.

Where the facts found showed that the deceased approached the crossing at a dangerously rapid rate of speed, and that he drove upon the track without reducing the pace of his team when he could have seen and heard the train approaching in time to have avoided the injury, if he had looked and listened, the court *held*, that the conclusion was irresistible; that the deceased must have seen and heard the train; that he was driving at a rate of speed which he supposed would carry him over the crossing in safety; and that the general verdict being inconsistent with the facts so

found, must be set aside. Cones *v.* Cincinnati, I., St. L. & Chich. R. Co. (Ind.), 16 N. E. Rep. 638.

In Indiana, B. & W. R. Co. *v.* Wheeler, 114 Ind. 328, the plaintiff sued to recover damages for negligently killing his son. The evidence showed that plaintiff's son, 20 years of age, was engaged in hauling wheat from the farm where it was being threshed to an elevator. The boy was well acquainted with the crossing where he was killed. Trains approaching on the railway track could be seen without difficulty for a distance of from 900 to 1000 feet from the highway over which the young man was proceeding, on a loaded wagon, up a rising grade towards the crossing of the railway track. A passenger train, running at the usual rate of about 30 miles an hour, approached the highway. The highway crossing signals were given as the statute requires. The whistle was next sounded for the station. Seeing a team approaching the railway, apparently without a driver, the engine-driver gave the usual danger signals. Observing that the team kept on its way regardless of the signals, which were continued, the engineer, when several feet from the crossing, and as soon as he apprehended that the team might not be halted, made every effort in his power to stop his engine so as to avoid a collision. A moment before the engine came into collision with the wagon the boy raised up. The engine came upon the wagon with such force as to shatter it to pieces, notwithstanding the efforts of the engine-driver to stop his engine. The boy only survived the collision about two hours. The engineer testified that he saw no one on the wagon, and supposed the driver of the team was walking on the opposite side. When he discovered that the team kept on its way, notwithstanding the danger signals, he at once reversed his engine, and employed the air-brakes and every other method and appliance at hand to stop the train. He had its speed so checked when the collision occurred that the train only ran over the crossing about 50 yards when it was stopped. *Held*, that there was no evidence of negligence on the part of engineer, and that there could be no recovery.

In an action to recover damages for injuries caused by an accident at a railroad crossing, it appeared that plaintiff attempted to cross the track, in a wagon, after dark; that the engine which struck his wagon had a headlight which was burning brightly, and which plaintiff could have seen when about fifty feet from crossing. The plaintiff was driving a gentle horse, and there was nothing to excuse his failure to see the headlight. *Held*, that he was guilty of contributory negligence and could not recover damages. Bloomfield *v.* Burlington & W. R. Co. (Ia.), 38 N. W. Rep. 431.

In Central R. Co. *v.* Hollinshead (Ga.), 7 S. E. Rep. 172, the plaintiff sued to recover the value of a mule killed at a railroad crossing. The court *held*, that the letter of a defence may be so strong as to weaken its spirit. That a reluctant mule was forced by its driver to run 20 or 30 yards, while a locomotive ran but 40 or 50, and thus the driver beat the train to the crossing, and voluntarily urged the mule upon it ahead of the engine, is less probable than that the mule was frightened by blowing the whistle, and ran upon the crossing contrary to the driver's will, and in spite of his exertion to prevent it, and that a judgment for the plaintiff must be sustained. See also, as to contributory negligence at crossings, Durten *v.* Oregon R. & N. Co. (Oreg.), 32 Am. & Eng. R. R. Cas. 149, note, 154.

Same—Finding of Jury—Sufficiency of Evidence.—In an action to recover damages for personal injuries, the plaintiff alleged that he was struck by a railroad train at a point where the track crossed a highway. The only positive proof as to the place where the plaintiff was struck was his own testimony. The defendant, for the purpose of disproving his statements, introduced evidence which showed that when attention was directed to plaintiff by his calling for help he was lying on the ground about eighty

feet from the crossing, and that his hat was found some distance from the crossing with the brim cut as though the wheels of the car had passed over it. It was also shown that the shock of the collision rendered plaintiff unconscious for the time, and that he was unable to move himself when he was found; but it was shown that he had moved himself to some extent before he was discovered. *Held*, that the testimony was not sufficient to conclusively establish the fact that plaintiff did not move himself, although in an unconscious or dazed condition, from the crossing to the place where he was found. Louisville & N. R. Co. *v.* Roberts (Ky.), 8 S. W. Rep. 459.

DELAWARE, LACKAWANNA AND WESTERN R. CO.

v.

CADOW.

(*Pennsylvania Supreme Court, May* 28, 1888.)

Highway Crossings—Personal Injuries—Sufficiency of Crossing—Contributory Negligence.—In an action to recover damages for personal injuries sustained while walking across defendant's track, it appeared that plaintiff was a cripple with a stiff leg; that he had a safe path which he had often travelled along the side walk to the opposite side of the railroad; that he left this path to go hastily upon a route leading across the road and railroad in a diagonal line and over a plank crossing, the condition of which he did not know; that it was dark and he had no light; that he got off the crossing beyond the planking, stumbled among the rails, fell, and was injured. *Held*, that the plaintiff in leaving the sidewalk and venturing upon the planking was guilty of such contributory negligence as required the court to direct a verdict for the defendant.

ERROR to Court of Common Pleas, Columbia County.

Trespass on the case by Albert E. Cadow against the Delaware, Lackawanna & Western R. Co. to recover damages for personal injuries. The defendant brings the present writ of error to review a judgment for the plaintiff. The defendant's eleventh point, which was refused by the court, asked that a verdict should be entered for the defendant. The thirteenth assignment of error was founded upon the refusal of this point. The other facts are stated in the opinion.

George E. Elwell and *John G. Freeze* for plaintiff in error.

Ikeler & Herring and *William Chrisman* for defendant in error.

WILLIAMS, J.—The learned judge of the court below af-

firmed the defendant's tenth point while refusing the eleventh. The instruction asked by the tenth point was as follows: "If the court should be of the opinion that a pedestrian has the right to cross the highway at any point, then we respectfully ask the court to charge the jury that if in so doing, in the night time, a cripple with a stiff leg departs from a path which he knows is safe, and ventures hastily upon one whose condition he does not know, in order to reach the same point on the opposite side of the street, he is guilty of negligence and cannot recover damages for injuries received by falling over an obstruction which he knew lay in his path."

Instruction as to contributory negligence.

The facts embodied in this point appear in the testimony of the plaintiff. He was a cripple with a stiff leg, the result of an early fracture. He had a safe path, which he had often travelled, along the sidewalk to the opposite side of the railroad, and thence to his work. He left this path to go hastily upon a route leading across the road and railroad in a diagonal line and over a plank crossing, the condition of which he says he did not know. It was in the night time and he was without a light. In hastily crossing the railroad which he knew to be in his path he got off the crossing on the east of the planking, stumbled among the rails, fell and was injured. There was no controversy over any one of the facts grouped together in this point, and the answer affirming it left nothing for the jury.

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It may be that the crossing did not extend as it should have done over all of the road way available for passage, and that the company was guilty of negligence in leaving it in the condition in which it was at the time of the accident; but this point asked, and the court gave, an instruction that the facts stated showed the plaintiff to be guilty of negligence and that he could not recover for that reason. A party cannot recover damages for an injury which by the exercise of reasonable care he might have avoided. Beatty *v.* Gilmore, 16 Pa. 463; Pittsburgh S. R. Co. *v.* Taylor, 104 Pa. 306.

Plaintiff guilty of negligence.

Negligence is, ordinarily, a question for the jury, but where the facts are uncontroverted their legal effect is for the court. Catawissa R. Co. *v.* Armstrong, 52 Pa. 282; Pittsburgh & C. R. Co. *v.* McClurg, 56 Pa. 294; McKee *v.* Birdwell, 74 Pa. 218; Erie *v* Magill, 101 Pa. 616; s. c., 2 Am. & Eng. Corp. Cas. 579.

All the facts affecting the question of contributory negligence were furnished by the plaintiff's testimony. What was this legal effect? This was the question presented by the tenth point and as we think properly answered. If so, there was no question left which if submitted to the jury could relieve the

plaintiff from the consequences of his own carelessness; and the binding instruction asked for in the eleventh point should have been given.

Judgment reversed.

Injury at Crossing—Contributory Negligence.—See Louisville & N.R. Co. *v.* Schuster (next case), and note.

Injuries Caused by Traveller Leaving Sidewalk—Contributory Negligence.—This subject has been fully discussed in Clarke *v.* City of Richmond, 19 Am. Eng. Corp. Cas. 320, 324, and note.

LOUISVILLE AND NASHVILLE R. CO

v.

SCHUSTER.

(*Kentucky Court of Appeals, April 7*, 1888.)

Highway Crossing—Personal Injuries—Contributory Negligence—Duty of Company.—The plaintiff in an action to recover damages for personal injuries sustained by him while crossing a railroad track at a crossing, is entitled to recover, notwithstanding the want of ordinary care upon his part, if those in charge of the train could, by the exercise of ordinary prudence on their part, have avoided injuring him.

Same—Permission to Cross Track.—If, by the implied assent of a railroad company, the public are permitted to cross the track and are accustomed to do so, it is the duty of those in charge of the trains to be on the lookout for persons using the crossing, and to give reasonable notice of their approach.

APPEAL from Court of Common Pleas, Jefferson County.

Action by Nathan Schuster by his next friend against the Louisville & Nashville R. Co. to recover damages for personal injuries alleged to have been caused by the negligence of defendant's employees. The defendant appeals from a judgment for the plaintiff. The case is stated in the opinion.

Barnett, Noble & Barnett for appellant.

Brown, Humphrey & Davie for appellee.

HOLT, J.—The appellee avers that, through the gross negligence of those in charge of it, a train of the appellant ran over him, crushing both of his legs, in consequence of which they had to be amputated. The answer merely denies the negligence. There is no plea of contributory neglect upon the part of the appellee. It is affirmative matter of defence, and, if relied upon,

Pleading contributory negligence—Proximate cause of injury.

must be pleaded. Even a verdict will not cure a failure to do so, because, while it may aid a defective plea, it will not avail if there be no plea. Moreover, in this case there were special findings; and, among them, the jury found that, notwithstanding the want of ordinary care upon the appellee's part when he was injured, those in charge of the train could, by the exercise of ordinary prudence upon their part, have prevented it. The jury found that the proximate cause of the injury was the lack of ordinary care upon the part of the appellant. In such a case it is a well settled rule in this State that the injured party can recover. Commencing with Railroad Co. *v.* Yandell, 17 B. Mon. 466, if not earlier, there is an unbroken line of cases down to Railroad Co. *v.* McCoy, 81 Ky. 404, and, indeed, some later, so holding. The only question, therefore, involved here, is whether the appellant was guilty of such neglect.

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The accident happened upon that portion of its road between Bear Grass creek and its depot in the city of Louisville, and within the corporate limits of the city. At the immediate point where it occurred there is a heavy fill, from 20 to 30 feet high, and about 23 feet wide at the top. Upon it are two tracks, with some seven or eight feet of space between the inside rails of each. Buchanan street has been constructed to within from 150 to 200 feet of this fill upon its south side. Many people live and work in that vicinity. Indeed, it is a part of the city, and appears, for the most part, to be thickly peopled. There are therefore many persons passing about and along and across the appellant's road at that point. There are other streets, not far from Buchanan street, and running in the same general direction, and which are connected with it by cross-streets, that have been built across the railroad. The only way to cross it, however, from Buchanan street, in a course continued like that of the street, is to follow a pathway leading from the end of it to the railroad embankment, and thence up it onto the railroad track, from whence, after passing along and across it diagonally for a few steps, you descend upon the north side by means of a footway. The appellee, who was then but 15 years old, had been peddling matches in another part of the city, and late in the afternoon was on his way home. He came down Buchanan street in company with another boy, and at the end of it they pursued the footpath and climbed up the embankment for the purpose, probably, of going down the path upon the other side, and in that way reaching home. They started along the track upon the south side of the embankment; but, as a train leaving the city upon it was nearing them, they left it, and stepped upon the track upon the north side. Owing, doubtless, to their atten-

tion being drawn to the outgoing train, they failed to discover that an incoming train was behind them, and upon the same track upon which they now were. It was coming at the rate of about six miles an hour upon a down grade. It had come in sight of them around a curve a short distance from them, but far enough off to have enabled those in charge of it to have kept it from running over the appellee, if they had seen him. The out-going train had just passed them, or was in the act of doing so, when the in-coming train came upon them, striking the appellee, while his companion jumped from the track, and thus escaped injury. The special findings are that the appellee was injured by the appellant's engine, when in charge of its employee, and near the mouth of Buchanan street, and within the city limits; that there was a crossing over the railroad at that point; that the appellee was, when struck, upon the track upon which the train was moving; that those in charge of it did not know of his position in time to have avoided the injury, but by the exercise of ordinary care upon their part could have discovered it in time to have checked or stopped the train, or notified him, by whistling or otherwise, of his danger, thereby avoiding the injury, or enabling him to escape; that the employee who could, by the use of such care, have known and done this was the fireman; that the appellee knew, before he attempted to cross the track, that trains were frequently moving thereon, and could, when attempting to cross, by the exercise of ordinary care, have discovered the approaching train in time to have saved himself from injury; that those in charge of the train could, notwithstanding the want of ordinary care upon his part, by the exercise of such care, have avoided the injury; that appellee was then 15 years old; that it would not have been safe for him to have stood between the two tracks, and thus permitted the two trains to pass upon each side of him at the same time; and that $5000 in damages would reasonably compensate him for his injury. The jury, by reason of disagreement, returned no answer to the question whether those in charge of the train, as it approached the point where the accident occurred, gave any signal thereof by whistle or bell.

It is urged that, as the appellee was a footman, and hence could easily get out of the way of the train upon warning of its approach, there being no claim that its speed was too great, that, therefore, there could have been no negligence upon the part of the train-men save in failing to give the usual signals of its approach; and, as the jury did not find upon this point, that the appellee failed to make out the case. The degree of care to be exercised by a railroad company must necessarily depend upon the location, and the circumstances of the case. At places not frequented

Duty of company at crossing.

by the public either by right, or the permission, express or implied, of the company, and in localities where people are not constantly passing about, and where they cannot reasonably be expected to be, those in charge of a train are not required by law to be on the lookout for them. In such cases the company is entitled to the exclusive use of its track, and those upon it are trespassers; and those in charge of a train are only required to avoid injury to them if they can do so upon becoming aware of their peril. In a place thickly populated, however, and where many persons are known to be constantly passing about and across the road, as in a city like Louisville, the public interest, and regard for the safety of human life, require a different rule. In such a case those in charge of such a dangerous agency as a railroad train must be on the lookout for persons upon and crossing its track, and must, by the customary signals, warn them of the approaching danger. This rule should be rigidly enforced. Railroad Co. *v.* Hoehl, 12 Bush, 50; Same *v.* Howard, 82 Ky. 218. We do not mean to hold that, in such a case, the train must stop whenever it comes within sight of a person upon the track, provided he is not then in immediate danger. Such a rule would, of course, impede public travel and destroy the recognized usefulness of railroads. But, at such places and under such circumstances, it is the duty of those in charge of a train to be on the lookout for persons upon its track, and give all reasonable notice of its movements. In this instance the train was running within the limits of a large city. It was in the midst of its population. Those in charge of it knew that people were almost constantly upon and crossing the track. The path by which the appellee went upon it, and that leaving it, were plainly visible. The evidence shows that persons frequently crossed the track at that point. It is reasonable to presume that this use was permissive from the appellant. It is true that the jury failed, in express terms, to say that it was a crossing in general public use; but they did say that it was "a crossing," and the fair interpretation to be placed upon the answer is that it was used as such by the public. The appellee was therefore there by the implied consent, at least, of the appellant. Its agents were therefore, by reason of this fact, as well as the additional one that the locality was one where people might reasonably be expected to be upon or crossing the track, bound to keep a lookout for their protection.

The evidence is conflicting as to whether the signals customary in passing through a city or a public thoroughfare were being given at the time of the accident. It is tolerably certain that the usual sharp whistle, generally used in case of immediate danger, was not given. Indeed, the engineer and fireman did not discover the appellee until the train was upon him; and

the evidence tends strongly to show that one or the other of them would have done so if the necessary outlook had been kept. While, therefore, the jury did not find whether any signal, by bell or otherwise, was given as the train approached the place where the injury was inflicted, yet they did find that those in charge of it could, by the exercise of ordinary care, have discovered the danger to the appellee in time to have either checked the train, or notified him of its approach; thereby either avoiding the injury, or enabling him to escape. The answer to this interrogatory is sufficiently definite, at least when considered in connection with the succeeding one, by which the jury said that the fireman, by the use of ordinary care, could have known of the appellee's position upon the track in time to have stopped the train, or notified him of his danger. The findings, therefore, present this state of case, to-wit: The injury resulted from the appellee being struck by the appellant's train when upon its track at a crossing in a large city; that, although those in charge of the train did not discover his danger in time to save him, yet by the use of ordinary care they could have done so, and avoided the injury, by either checking the train, or warning him of his danger, by whistle or otherwise, thus enabling him to escape. In short, the jury found, as a matter of fact, that the injury to the appellee was the result of the want of ordinary care upon the part of those in charge of the train; and this was sufficient, in our opinion, to authorize the judgment in his favor, although the jury failed to say whether, as the train was approaching the point where the accident occurred, any signal, by whistle or bell, was being given. Judgment affirmed.

Signals—Plaintiff injured by defendant's negligence.

Injury at Crossings—Contributory Negligence.—As to contributory negligence of a person in crossing railway track, see 4 Am. & Eng. Encyc. of L., tit. CROSSINGS; *ante*, Galveston, H. & S. A. R. Co. *v.* Horne, 238, and note, 242-246; Delaware, L. & W. R. Co. *v.* Cadow, 405; *post*, State, to use of Harvey, *v.* Baltimore & O. R. Co., 412; International & G. N. R. Co. *v.* Kuehn, 421; Gulf, C. & F. R. Co. *v.* Greenlee, 425.

Liability for Injuries Notwithstanding Contributory Negligence.—See Kelly *v.* Union R. & T. Co., *ante*, p. 396.

Same—License to Cross Track.—As to license to cross track acquired by use, see, *ante*, Turner *v.* Fitchburg R. Co. and note, 320, 321.

STATE, to Use of Harvey,

v.

BALTIMORE AND OHIO R. CO.

(*Maryland Court of Appeals, June* 14, 1888.)

Highway-crossing—Negligent Killing—Contributory Negligence.—Plaintiff's wife was killed by an engine while attempting to cross a railroad track at a public crossing. She attempted to cross in full view of an engine, twenty feet away, which was moving towards her, but stumbled and fell, and the engine ran over her while she was down. *Held*, that an instruction directing the jury to return a verdict for the defendant was erroneous, as the railroad company was liable, notwithstanding deceased's contributory negligence, if the engineer in charge after the discovery of deceased's danger could have prevented the accident by the use of reasonable means.

APPEAL from Circuit Court, Baltimore County.

Action in the name of the State of Maryland to the use of Edward Harvey against the Baltimore & Ohio R Co. to recover damages for negligently killing the wife of the equitable plaintiff. The plaintiff appeals from a judgment for the defendant.

Albert Ritchie, *Edward I. Clark*, and *D. G. McIntosh* for appellant.

John K. Cowen, *W. Irvine Cross*, and *John I. Yellott* for appellee.

STONE, J.—This is an action against the Baltimore & Ohio R. Co., for negligence in causing the death of the wife of the equitable plaintiff. After all the testimony had been given, the court instructed the jury that the plaintiff was not entitled to recover, because the evidence of the plaintiff showed that the deceased directly contributed to the accident that caused her death. The court refused a modification of this prayer offered by the plaintiff, and also, as the exception states, refused to consider, while acting on said prayer, any evidence favorable to plaintiff elicited through defendant's witnesses. In this we think the court below erred. At the close of the plaintiff's evidence, if the defendant thinks that the evidence of the plaintiff is not legally sufficient to support the action, he has the right to ask and have the ruling of the court upon it. In such case there is nothing before the court except the plaintiff's testimony. But, if the whole evidence, both of plaintiff and defendant, is in before such instruction is asked for, the whole evidence must be considered by the court, and not

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that of the plaintiff only. The reason of this is obvious. The evidence offered by the defendant may and often does supply a defect in the proof of the plaintiff. When, therefore, an instruction is asked that takes the case away from the jury, after the whole evidence is before the court, before such instruction is either granted or refused, the whole evidence must be considered by the court, and the ruling based upon that, and not confined to the evidence of plaintiff.

But while the court below were in error in granting the prayer, confining, as it did, its consideration to plaintiff's proof only, such error will not authorize a reversal of the judgment if it appears that, upon the whole proof, the plaintiff was not entitled to a verdict. Before, then, we can determine whether this case shall be sent back for a new trial, we must examine the proof, and see whether there is enough in it to authorize its submission to a jury. Before we can do this, we must take all the evidence favorable to the plaintiff, and assume its absolute verity. When the facts are undisputed, or where but one reasonable inference can be drawn from them, the question is one of law for the court; but where the facts are left by the evidence in dispute, or fair minds might draw different conclusions from them, the case should go to the jury. 2 Thomp. Neg. 1179. There is no other question presented to us by the exception but the question of whether this case should be left to the jury or not; and, to determine that, we must be governed by the aforegoing rule, or, as it is said in Fitzpatrick's Case, 35 Md. 32, there must be some prominent and decisive act, in regard to the character of which there is no room left for ordinary minds to differ, before the court will hold it to be a question of law for the court, and withhold the case from the jury. Mrs. Harvey, the wife of the equitable plaintiff, was killed by an engine of the defendant while she was crossing Ohio avenue, in Baltimore city. She attempted to cross that avenue in full view of an engine moving towards her, and stumbled and fell upon the track, and the engine ran over her while she was down. We have said in Mali's case, 66 Md. 53; s. c., 28 Am. & Eng. R. R. Cas., 628, that a person who attempts to cross a railroad track in view of an engine moving towards him, and not more than 12 feet from him, was guilty of contributory negligence, as a matter of law. While that was the distance from the engine that the plaintiff in that case attempted to pass, and therefore was applicable to that case, it is evident that no inflexible rule can be laid down as to the distance before a moving train within which it is safe to attempt a crossing. It will depend upon the rate of speed at which the train is moving,

When case should go to jury.

Contributory negligence in crossing in view of engine.

and the condition of the person. Each case, therefore, must measurably depend upon its own peculiar facts. It might be clearly negligent in a cripple to attempt to cross a track 500 feet before an express train moving at the rate of 40 miles an hour, but not so in an active person attempting the same thing 100 feet before a yard-engine moving four miles an hour. There are some contingencies always liable to occur to persons attempting to cross railroad crossings in front of a moving train. One of these is the possibility of an increase in the rate of speed of the train, and another is the liability of the person to stumble or fall. The road, in the prosecution of its legitimate business, has the right to slacken or increase its speed, and may do so at any moment. The liability of a tumble and fall is sadly illustrated in this case. No such crossing should be attempted unless some allowance is made for these contingencies. The evidence for the plaintiff is principally the evidence of Ida Cummings, a young girl of about eleven years of age, and a colored man, Bailey, and is not very lucid. Taking the view most favorable to the plaintiff as disclosed by their testimony,—and this we are bound to do,—we cannot find that the engine was more than twenty feet from Mrs. Harvey when she started to cross the track. The rate of speed of the engine is not given, but the witnesses say it was moving slowly. If it was going at the rate of five miles an hour, it would have passed over that space in rather less than three seconds of time. Mrs. Harvey's death was the result of her fall. Her fall was not owing to the negligence of the road. It was a risk she voluntarily assumed in attempting to cross the track, and the road cannot be held responsible for its result. There were no surrounding circumstances that showed she was placed in a position of peril by the act of the road. It is true, she was upon a net-work of tracks; but no train or engine was moving towards her except the one by which she was killed. She said she was in a hurry to get home, and when she saw the engine she quickened her pace, in order to get ahead of it.

Something has been said in the argument, and disclosed in the testimony, as to failure of the engineer to ring the bell, or the flagman to give notice, and also the failure to have a man in front of the engine, as required by the old ordinance of the city. It is enough to say that the only object of notice by bell, etc., is to give the person crossing notice of the approaching train. If he, however, sees the approaching train, he has all the notice that such signals could give him, and has no right, with his eyes open, to run into danger, with or without such signals. It has been urged in argument that Mrs. Harvey was placed in peril

Signals—Flagman's warning—Duty of engineer.

by the act or negligence of the defendant in having the gates across the street open. Whether that was so or not was a question of fact, to be determined by the court or jury upon all the testimony offered on that point. The decisive and controlling fact in the case, however, was the voluntary attempt of the deceased to cross the track in full view of a moving engine, and so near to it that no person of ordinary prudence would have made the attempt. But, while we said in Mali's case that the ordinance requiring a man in front of the engine was practically obsolete, we also said that it was the duty of the road to take every reasonable precaution to prevent loss of life or property in crossing the streets of the city. Notwithstanding, then, that Mrs. Harvey voluntarily placed herself in the position that she did, and that the road cannot be held liable for that, yet it was the duty of the engineer in charge, after the discovery of the danger of Mrs. Harvey, to have used all reasonable efforts to have averted it. The record is comparatively silent on this question. As it is possible that it might arise, and as there was no opportunity, under the instruction given by the court in the former trial, to raise it, we will remand the case for a new trial. The law is too well established to need the citation of authorities to show that although a person may unlawfully or recklessly be upon a railroad, and by his own voluntary act be placed in a position of peril, still it is the imperative duty of the engineer, or person in charge, as soon as the dangerous position is discovered, to use all reasonable efforts to prevent an accident. The complete exoneration of the defendant, then, depends upon these two propositions: First, that the deceased was guilty of contributory negligence in being upon the track; and, secondly, that, as soon as her danger was discovered, every reasonable effort was made to avert it. The instruction granted entirely ignored the latter proposition, and is for that reason, also, defective. Judgment reversed, and new trial awarded.

Injury at Crossing—Contributory Negligence.—See, *ante*, Louisvillle & N. R. Co. *v.* Schuster 407, and note, 411.

Same—Negligent Killing.—See, *post*, Petrie *v.* Columbia & G. R., 430, and note, 440.

Crossing in Front of a Moving Train.—See, *post*, International & G. N. R. Co. *v.* Kuehn, 421, and note, 424, 425.

DUAME

v.

CHICAGO AND NORTHWESTERN R. CO.

(*Wisconsin Supreme Court, November* 8, 1888.)

Highway Crossings—Negligent Killing—Duty to Look and Listen.—When a train has passed a crossing within the view of a person intending to pass over it, under such circumstances that he has no reason to expect the approach of any train from the direction in which such train went, the rule which requires persons approaching a railroad crossing to look and listen for the approach of a train has no application, if such person was killed or injured by the backing of such train without warning.

Same—Duty of Company.—When a train has just passed a crossing and is backing to it again, it is the duty of the company to have some persons on the rear car so that he may see and warn persons intending to use the crossing of the approaching danger.

APPEAL from Circuit Court, Oconto County.

Action by Mary A. Duame, administratrix, against the Chicago & North Western R. Co. to recover damages for negligently killing plaintiff's husband. The plaintiff appeals from a verdict for the defendant, returned by the jury by direction of the court.

The opinion states the case.

E. H. Ellis for appellant.

Jenkins, Winkler, Fish & Smith for appellee.

ORTON, J.--This is a brief, yet substantially correct, statement of the facts: The track of the defendant's railway crosses Main street in the city of Oconto, nearly north and south. Near the south side of the street there are two side tracks, with switches, and about 70 feet north of the street there is another side track, with switch running south. There is a pile of wood 50 feet long, and eight or nine feet high, on the east side of the defendant's right of way, extending north from the north side of the street; and the ground for some distance east of the track north of the street is about 4 feet higher than the track, and there is a house about 40 feet north of the street, and a short distance east of the wood-pile. The train, which consisted of the locomotive, two box-cars, and a caboose, had come out on the main track from one of the side tracks, and run north across the street; and, when it had passed about two or three car-lengths north of the street, it stopped, and immediately backed down towards the street. During this time the engineer and fireman were on the engine, the conductor stood in the door of the caboose on the east side, one brakeman stood

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upon the north platform of the caboose, and the other brakeman stood near the switch, south of the street. There was no flagman at this crossing, and no one on the rear end of the train to give warning to those about to cross the track at that place, and whether the bell was rung was a fact in dispute: witnesses for the defendant testifying that it was, and other witnesses testifying that they did not hear it. The deceased, in a one-horse vehicle, was driving west on Main street, towards his home, about seven miles in the country; and had approached within seven or eight rods of the crossing from the east, when the train passed over it, and went on north, out of his sight, and he continued on a trot towards the crossing, and, as his horse stepped on the track, the rear car of the train was very near it; and whether he attempted to back or turn around or pass over, the evidence is uncertain, but his carriage came in contact with the rear car, and he was thrown under its wheels and killed. The conductor of the train, from where he stood, in the east door of the caboose, saw the deceased as he was approaching the crossing, and gave no signal or warning to the engineer to stop the train, as he might have done, and took no precaution whatever to avoid the accident; and, when asked on the trial what he did, said that "he did nothing at all; if he hadn't sense enough, let him go." He could have kept watch of the deceased, but did not, and stood there looking over his way-bills, and did nothing. The brakeman standing near the switch, on the south side of the street, also saw the deceased approaching the crossing, and knew that the train was backing down towards the crossing, and yet gave no signal or warning to the engineer in time to stop the train before it came in contact with the deceased; and the other brakeman, standing on the front platform of the caboose and near the engineer, and who gave the signal to the engineer to stop the train when it was stopped, and whose business it was to look to the other brakeman for signals, was not looking that way all of the time. If the brakeman at the switch gave any signal to stop in time to prevent the collision, he did not see it, because not looking that way at the time; and yet it was his business so to look. The jury rendered a verdict for the defendant, by the direction of the court, and of course this is the error complained of on this appeal.

The evidence tending to prove the negligence of the employees of the defendant is very strong, if not conclusive; and we infer, therefore, that the court directed the verdict on the ground of the contributory negligence of the deceased. We are asked by the learned counsel of the appellant to hold, in view of the evidence, that the killing of the deceased was not only the result of the want of proper care on the part of the conductor of the train and of other em-

Gross negligence and reckless misconduct of defendant.

ployees of the defendant, but that it was occasioned by their gross negligence, recklessness, and criminal misconduct; and that, therefore, the question of the contributory negligence of the deceased is not in the case. The conduct of the conductor was certainly very reprehensible, and, in connection with his own explanation of it, evinces a cold-blooded indifference which, I am happy to say, is not common among railway employees. But, without a finding by the jury on such an important question or fact, we would not feel warranted in first passing upon it. The evidence to such end ought to be perfectly conclusive and overwhelming, and we can scarcely believe that the omission of the conductor to signal the engineer to stop the train, until he could be assured of the safety of the deceased, was wilful, or that he apprehended such a collision as the result of it. This is most properly a question for the jury, and not for the court. Inasmuch as the case must again be tried, and the questions of negligence be passed upon by a jury, we refrain from expressing an opinion upon them further than to say that the circuit court erred in directing a verdict for the defendant, on the ground either that the defendant was not guilty of negligence, or that the deceased was; but we shall only consider the last as the probable ground for such direction. As a general rule, and unaffected by other circumstances, the proposition urged in the brief of the learned counsel of the respondent, that one approaching a railroad crossing who may, by looking, have a timely view of an approaching train, is bound to look and listen for its approach, before attempting to cross the track, and that a failure to do so is negligence, may be correct, and the circuit court most probably applied this strict rule to the plaintiff's case. We do not think that such a rule would be applicable to this case. There is a most important fact in this case, that materially modifies this strict rule, and makes it inapplicable, and that is that this train had just passed this crossing while the deceased was within a few rods of it and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption was that it would go on, and not retnrn. He was thus thrown off his guard. There was no reason to look or listen in that direction further, for it appeared impossible to him that any train from that direction would or could approach the crossing within so short a time. He was entrapped by this unexpected return of the train, for its sudden return over the crossing without warning was to him a trap. We know how it must have appeared to him, for it would have so appeared to any ordinary person with the same knowl-

Rule requiring traveller to look and listen not applicable.

edge of the situation. Not knowing or supposing, or having any reason to suppose, that the train would immediately return, or that any train would come from that direction, he did as any other reasonable person would have done, and kept straight on, without lessening his speed, as if assured that the way was clear, and that there was no possible danger. To have stopped and looked and listened in that direction, under such circumstances, would have been unreasonable, and the law requires no such unreasonable thing as a duty or obligation. When he had come to within a few feet of the crossing, with no signal to attract his attention, he appeared to be suddenly conscious that the end of a box car was creeping down upon him; and what he did or tried to do in this sudden emergency and danger is not very clearly known, or just how he came to his death under the wheels. Under such circumstances, the law does not require that he should have acted or be judged according to any strict or fixed rule. He was evidently surprised and confused by the sudden appearance of the train so near him. I have said that the train went north out of sight of the deceased, and there was testimony to this effect; although it is contended by the counsel of the respondent that the top of the cars might have been seen by him all the time. But this was a question for the jury, when there was conflict of the evidence. But it is quite immaterial whether he could have seen the tops of the cars or not. He had no occasion or reason to look that way any longer after the train had passed on to the north in such a manner as to lead him to suppose that it would continue on in that direction. But enough has been said to show that the circumstances were such as to make the rule that a person approaching a railroad crossing is bound to look and listen for the approach of the train, inapplicable to the deceased. This would seem to be too obvious to require authority. But the principle involved has been often recognized by the courts. In Curtis *v.* Railroad Co., 27 Wis. 158, the train, in being brought up to the station, came to a stop in such a manner as to induce the belief on the part of the passengers waiting on the platform that it had stopped for their reception, and the plaintiff, in attempting to get on, was injured by the sudden starting of the train without signal. It was held "that, if the plaintiff so acted as persons of common sense and ordinary prudence and intelligence usually act in like cases, there was no such negligence on his part as would prevent his recovery in the action." And it was further held "that this was an act of negligence on the part of the company; and that it was the duty of the company, if passengers were not to enter the cars under these circumstances, to have some one there to warn and prevent them, and of the persons in charge of the train, not to start it

Same—Authorities.

without previous caution or signal given." The application of that case to this is very clear. The deceased had the right to act as ordinarily sensible persons would be likely to do if this train passed on in such a manner as to induce the belief that it was to continue on in that direction, and drive on, as he did, towards the crossing, without further attention to that train; and, to further apply the case, it would seem that the company was negligent in not having some one there to prevent persons from attempting to pass over the crossing in the mean time, if the train was to be almost immediately backed down over the crossing, and the persons in charge of the train should not have so backed the train over the crossing without previous caution or signal given. In Bower *v.* Railway Co., 61 Wis. 457; s. c., 19 Am. & Eng. R. R. Cas. 301, it was held "that a person approaching a railway crossing with a team, and having reason to suppose that a regular passenger train has recently passed from one direction, is not guilty of negligence if he fails to look constantly in that direction." In Eaton *v.* Railway Co., 51 N. Y. 551, the train was standing with the rear car nearly over the crossing, and the plaintiff attempted to cross with a horse and buggy, and it was suddenly backed upon him. It is said in the opinion: "The plaintiff had a right to expect that some previous warning would be given that the train was about to back, to put him in fault. The measure of precaution which prudence suggests is in due proportion to the probability of danger." If, by the negligence or omission of those in charge of the train, the plaintiff's vigilance was allayed, they are not at liberty to impute the consequence of their acts to his want of vigilance; and, if their acts brought him within the boundaries of peril, they must answer for the results. Railroad Co. *v.* Ogier, 35 Pa. St. 72. If in this case those in charge of the train allayed the vigilance of the deceased by running the train over the crossing, and on towards the north, in such manner as to cause him to believe that it would continue, and not return, and immediately run it back over the crossing, they are not at liberty to impute the consequence of such act to his want of vigilance, and, if such unexpected return brought him into peril, they must answer for the result. It is contended that the train did not return without warning or signal, but that the bell was rung constantly on its return. It is true that many of the defendant's witnesses testified that the bell was so rung, but many of the plaintiff's witnesses testified that they did not hear it, and some of them were so situated that they would have heard it had it been rung. This is certainly made a conflict of evidence, and a question for the jury. But if the bell were rung on the engine at the other end of the train, if he did not see the train, and did hear

Evidence as to signals.

the bell, he could not have known with any certainty whether it was rung for the going forward or the return of the train. On this appeal we must assume that no warning or signal was given. As said before, it would seem that, under the circumstances, there ought to have been some one on the rear car, or in some position where he could have seen that no one was about to cross the track before it was backed down over the crossing, to give the deceased timely warning, and to signal the train to stop if there was danger of a collision. This may not be important as affecting the question of the defendant's negligence, as its negligence seems to have been established by other acts as well, but it may be important as affecting the question of the negligence of the deceased. It can readily be seen that the peculiar circumstances of this case make the contributory negligence of the deceased a question for the jury, and not for the court to decide as a question of law; nor would it be a question of law to decide that the deceased was not guilty of such negligence until the jury had passed upon the disputed facts upon which such a decision must depend. The court erred in directing a verdict for the defendant. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Contributory negligence a question for jury.

Injury at Crossing—Negligent Killing.—See, *post*, Petrie *v.* Columbia & G. R. Co., 430, and note, 440.

INTERNATIONAL AND GREAT NORTHERN R. CO.

v.

KUEHN *et al.*

(*Texas Supreme Court, May* 1, 1888.)

Highway Crossing—Negligent Killing—Contributory Negligence.—In an action to recover damages for negligently killing plaintiff's husband, if it appears that the deceased saw the train when about forty paces from the highway crossing; that he thought he could pass before it reached the crossing and whipped up his horse for that purpose; and it is also shown that he was under the influence of liquor, and acted recklessly, there was culpable negligence on the part of the deceased, without which he would not have been injured.

Same—View of Track—Obstruction.—If it is shown that certain bushes which grew from ten to twenty feet outside of the right of way were at the time of the accident bare of leaves, and in fact no obstruction to the view of the track, it it error for the court to instruct the jury that it is negligence for the company to suffer brush or tall weeds to grow upon its right of way so as to materially obstruct the view of approaching trains.

Same—Action by Widow—Suit by Deceased.—The fact that deceased had instituted a suit to recover damages for injuries sustained while crossing defendant's railroad track, which was pending at the time of his death, is no bar to an action by the widow and children to recover for negligently killing him.

Same—Action by Widow—Remarriage.—The fact that, pending a suit to recover damages for negligently killing her husband, the plaintiff married again, does not preclude her right to maintain the action.

Same—Infant Plaintiffs—Next Friend.—The husband of their mother has no interest in a suit by infant plaintiffs to recover damages for negligently killing their father, and he may competently act in such suit as next friend.

APPEAL from District Court, Comal County.

Action to recover damages for negligently killing the husband and father of the plaintiffs. The defendant appeals from a judgment for plaintiffs. The opinion states the case.

J. D. Guinn and *J. H. McLeary* for appellant.

Burges & Dibrell and *W. R. Neal* for appellees.

WALKER, J.—The widow and the two minor children of Julius Kuehn sued the appellant, and obtained judgment for negligently killing the said Julius. It is elementary, and recognized in the many decisions of this court in like cases, that, to recover in such case, it devolves upon the plaintiffs to show that the death was caused by the defendant; that, in the collision causing the death, the deceased was using proper care, that is, that he was not himself guilty of negligence directly contributing to the collision; and that the defendant company was guilty of negligence, or want of the proper care called for under the circumstances. Regarding the testimony as sufficient in this case to show want of care or negligence on part of the defendant, it remains to determine whether the deceased so acted in the matter as to allow the plaintiffs to recover for the negligence of the defendant. It is a natural presumption that a man in his right mind will not voluntarily and without motive encounter a threatening danger. Where the attendant circumstances show facts from which a jury may deduce the conclusion of want of negligence on part of the deceased, this court will accord to the verdict a conclusive effect. The amount of testimony is for the jury; and, if exercising their judgment upon facts in evidence, their action will not, or rarely, be set aside.

What plaintiff must show.

In this case the testimony shows that deceased was going home from the town of New Braunfels, near which he lived, by an old and much-travelled, public road, with which he was well acquainted. The track of the defendant's railroad crossed the road he was travelling nearly at right angles. The track, at the crossing and for several hundred yards west of it, was upon an embankment variously estimated at from three

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to seven feet above the level; that to the right of the deceased, and for a distance of 300 yards from the crossing upon the railroad track, there was an unobstructed view from the road on which he was travelling. Some hackberry trees grew along a fence north of the track, and outside of the right of way; but these, being bare of leaves, made no material obstruction to the sight. The testimony is conflicting whether the bell was rung or the whistle sounded at the approach of the train to the crossing; but it is in evidence that the deceased had stated to witness Smith that he saw the train when it was about 40 steps off, and thought he could drive across it before it would reach him, and whipped up his horses for that purpose; to witness Hertman, "that he had seen the train while he was stopping in the lane." Witness Bruestedt, for the plaintiffs, had testified to meeting the deceased in the lane, about 50 steps from the track, at which point it seems some halt was made by the deceased. The train was provided with Westinghouse automatic air-brakes, the best known to the witnesess. The engineer testified that he "could not have stopped sooner than he did after seeing the intention of the deceased to cross the track." The duty to halt on part of those managing the train did not arise until it became manifest to them that the deceased was intending to go upon the track in front of the train.

In the charge of the court was the following clause: "It is negligence in a railroad company to permit or suffer brush or tall weeds to grow upon its right of way, so as to materially obstruct the view of approaching trains by persons about to cross its track; and if the jury believe from the evidence that the defendant permitted and suffered brush and tall weeds, as alleged in plaintiff's petition, to grow upon its right of way, so as to materially obstruct the view of approaching trains, by persons about to cross the railroad, on the crossing in question, and that but for such obstruction the injury would not have happened, then the defendant is liable in this case, unless you believe from the evidence that the deceased's own negligence directly contributed to the injury." After a careful study of the statement of facts we find no testimony authorizing this issue. The defendant asked a charge correcting the error, and saved the exception. The trial judge, in refusing the correction, remarks that, in his opinion, there was some such testimony. It may be that the statement of facts omitted it, but we are governed by the record as before us. It is shown that the hackberry trees spoken of by the witnesses grew some 10 to 20 feet outside of the right of way; that at the time, 27th February, the trees were bare of leaves, and in fact were no obstruction. It was shown that the deceased was under the influence of liquor, and in

Charge of court—Obstructed view.

Deceased guilty of negligence.

approaching the crossing acted in a reckless manner. Besides this, his actual knowledge of the presence of the approaching train rendered all questions as to means of knowledge of it of no importance. To give the charge set out above was error, and the verdict was against the testimony upon the issue of contributory negligence. We can but hold that the testimony negatives proper care, and shows culpable negligence on part of deceased, without which he would not have been injured.

We can notice but few of the many other assignments of error. The petition was good. That deceased had instituted suit for damages, which suit was pending at his death, is no bar to the action of the plaintiffs. That, pending the suit, the widow married again, does not preclude her right of action. The fact doubtless affected the verdict, as it gives her less damages than were given to each of the children. That the husband of the mother acted as next friend of the minor children was not error. He was not interested in the suit by them. Since this appeal was taken, this court has held in Railway *v.* Morris, 68 Tex. 49, that the defendant is not released from liability by its lease of the road to another company.

Action by widow—Infant plaintiff.

The charge of the court is exceptionally full and fair to both parties, with the exception of the paragraph above given. The court properly charged that the neglect of statutory duties was negligence as matter of law. Having given a clear exposition of the law applicable to the facts, it was his duty to refuse charges asked upon the subjects covered by the general charge. The defendant does not have the right to have the court charge upon the effect of isolated facts as negligence or not. The jury determines, upon the circumstances of the situation, where not a matter of law, the fact of negligence, under the charge as to the duty or degree of care imposed upon the parties arising from the entire fact, and upon exercising their judgment upon them.

Other charges of court.

For the error above stated, the judgment below is reversed, and the cause remanded.

Highway crossings—Negligent Killing.—See, *post*, Petrie *v.* Columbia & Gr. R. Co., 430, and note, 440.

Same—Contributory Negligence.—See, *ante*, Louisville & N. R. Co. *v.* Schuster, 407, and note, 411.

Same—Crossing in Front of Moving Train.—Ordinarily it is negligence in a person to attempt to cross in plain view of near and rapidly approaching train. Chicago R. Co. *v.* Bell, 70 Ill. 102; Belfontaine R. Co. *v.* Hunter, 33 Ind. 335; State *v.* Maine Cent. R. Co., 76 Me. 357; s. c., 19 Am. & Eng. R. R. Cas. 312; Baltimore & O. R. Co. *v.* Mali, 66 Md. 53; s. c., 28 Am. & Eng. R. R. Cas. 628; Schwartz *v.* Hudson R. Co., 4 Robt. (N. Y.) 347; Rigler *v.* R. Co. (N. C.) 26 Am. & Eng. R. R. Cas. 386; Bohon *v.* Milwaukee, L. & W. R. Co., 61 Wis. 391; s. c., 19 Am. & Eng. R. R. Cas.

276. The mere fact that the speed of the train is greater than usual or in violation of law will not excuse the party, Kelly *v.* Hannibal & St. J. R. Co., 75 Mo. 138, because where a person attempts to cross a railroad track in advance of an approaching train, and merely miscalculates his ability to do so in safety, there can be no recovery for a resulting injury. Chicago R. Co. *v.* Fear, 53 Ill. 115; Belfontaine *v.* Hunter, 33 Ind. 335; Schwartz *v.* Hudson R. Co., 4 Robt. (N. Y.) 347.

There are cases in which it is not negligence as a matter of law to attempt to cross in front of an advancing train. See Detroit & M. R. Co. *v.* Van Steinberg, 17 Mich. 99; Bonnell *v.* Delaware R. Co., 39 N. J. L. (10 Vr.) 189; Aaron *v.* Second Avenue R. Co., 2 Daly (N. Y.), 127; Baxter *v.* Second Avenue R. Co., 3 How. (N. Y). Pr. 219; s. c., 3 Robt. (N. Y.) 510; Langhoff *v.* Milwaukee R. Co., 19 Wis. 489.

See also note to Durbin *v.* Oregon R. & N. Co. (Oreg.), 32 Am. & Eng. R. R. Cas. 156.

GULF, COLORADO AND SANTA FE R. CO.

v.

GREENLEE *et ux.*

(*Texas Supreme Court, April* 20, 1888.)

Highway-crossing—Personal Injuries—Instruction.—In an action to recover damages for personal injuries, where there is some evidence that the train struck the oxen drawing plaintiffs' wagon, an instruction upon the hypothetical case of a collison between the engine and plaintiff's wagon cannot be deemed misleading to the prejudice of the defendant.

Same—Inevitable Accident—Instruction.—An instruction that if neither party was guilty of negligence, and the injury was the result of an accident, no recovery can be had, cannot be to the defendant's prejudice.

Same—Duty to Look and Listen.—Travellers upon a highway, which runs parallel to a railroad track before crossing it, are under no obligation to look for trains before they discover the crossing.

Same—Contributory Negligence.—According to the rule of the Texas courts, except in case of failure to perform a statutory duty, negligence is very rarely a question of law, and it is not error for the court to omit to instruct the jury that it was the duty of plaintiffs, as they approached the track, to look and listen for trains, if a charge as to the contributory negligence of the plaintiffs has been given in general terms.

APPEAL from District Court, Bosque County.

Action to recover damages for personal injuries sustained by plaintiffs. The opinion states the case.

W. M. Flournoy for appellant.

Alexander & Winter and *S. H. Lumpkin* for appellees.

GAINES, J.—This is an action brought in the court below by

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James S. Greenlee and his wife, Lou M. Greenlee, to recover damages for a personal injury to the wife, alleged to have occurred by reason of the negligence of the defendant company. The appellees were travelling along a public road in an ox wagon, and arriving at the road of defendant where it is crossed by a highway, and the heads of the oxen reaching the track of the railroad just as an engine drawing a train of cars swept past, the oxen were frightened by the locomotive, and, sheering to the right, overturned the wagon, and inflicted the injury of which appellees complained.

Impanelling jury—Peremptory challenges—Summoning talesmen.

The first question presented in the brief of appellant is as to the action of the court in impanelling the jury. It appears from the bill of exceptions that, when the parties announced ready for trial, a number of the jurors selected for the week had been impanelled in another case, and were then considering their verdict, and that thereupon the court directed the names of the remaining jurors to be drawn and placed upon the slips. Twelve names having been drawn and entered upon the slips, the parties were required to exercise their peremptory challenges. The counsel for defendant objected to exercising its right of challenge until the entire panel for the week had been placed in the box, and their names drawn by the clerk. The objection was overruled. The counsel then moved the court to allow them to suspend their challenges until a sufficient number of talesmen could be summoned to complete the list. This was refused, and the parties were required to strike from the lists furnished by the clerk before other jurors were summoned. In the action of the court there was no error. The statutes evidently contemplated that, when as many as 12 jurors are present for the trial of causes, their names must be drawn, and placed upon the slips, before others are summoned. Rev. St. art. 3091. The article cited provides, in substance, that, in cases in the district court in which not so many as 12 names remain in the box, the court shall direct the sheriff to summon a sufficient number of qualified persons as it may deem necessary to complete the panel; thereby clearly implying that, if 12 remain, talesmen shall not be summoned until the number is reduced by challenge. When as many as 12 are drawn, they are then subject to be challenged for cause. Id. art. 3092. If, by such challenges, the number be reduced to less than 12, then other jurors must be summoned. Id. art. 3093. But if, after the exercise of the challenges for cause, as many as 12 remain, then "the parties shall proceed to make their peremptory challenges, if they desire to make any." Id. art. 3094. Such is the meaning of the statute, literally interpreted; and its obvious intent is to prevent an unnecessary consumption of time. As long as it is

possible to complete the jury without resort to talesmen, this shall be done. Whenever the number is less than 12, either when first drawn, or after the challenges for cause or the peremptory challenges, then, and not before, the court is empowered to order others to be summoned by the sheriff. No reason is seen why the directions of the statute should not be literally pursued. Under them there is a reasonable assurance that every juror obnoxious to either party may be excluded from the panel, and thereby a fair and impartial jury secured. The articles we have cited from the Revised Statutes were partly, if not primarily, intended to meet the very contingency which presented itself in this case, and is wisely provided in order to save delay in the trial of causes, when such delay is not necessary to the due administration of justice. It is to be further remarked that the leading object of our present jury law was to avoid the evils resulting from the summoning of juries by sheriffs, and, in furtherance of that end, it is framed with the intent to secure the panel, when practicable, from the jurors selected by the commissioners.

There are several assignments of error which complain of the charge of the court. The court submitted an instruction to the jury upon the hypothetical case of a collision between the engine of defendant and plaintiffs' wagon; and it is objected to the instruction that there was no evidence of a collision, and that it is therefore erroneous. It seems to us, however, that this is quite an immaterial matter, and that, if the assumption that there was no evidence of actual contact were well founded, the charge could not have misled the jury to the prejudice of appellant. But, in point of fact, there was evidence of a collision between the engine and the oxen which drew the wagon. The plaintiff, J. S. Greenlee testified that he thought the engine struck the horns of the oxen, and, in another place, that his impression was it touched their legs. His wife's testimony was somewhat to the same effect. Neither of them was positive whether there was any actual contact or not. It is also complained that the court erred in charging the jury that, if neither party was guilty of negligence, the injury was the result of an accident, and no recovery could be had. But it is clear that the defendant could not have been prejudiced by this instruction. In reference to the other assignments which relate to the instructions of the court, we may say generally that, in our opinion, the court's charge correctly presented the law applicable to the case, and to the issues made by the pleadings and evidence. Upon each phase of the case the jury were clearly instructed that the plaintiffs could not recover if they failed to exercise ordinary care and prudence in attempting to cross the

Instructions—Hypothetical case of collision.

railroad track. It is claimed, however, that the charge was erroneous, because the jury were not told that the plaintiffs could not recover if they were negligent in not watching for the train before they discovered the crossing. But we know of no law which makes it the duty of travellers upon a highway which runs parallel to a railroad track, before crossing it, to look for trains before they approach the point of danger. The court charged, in effect, that if the plaintiffs, after they "ascertained where the crossing was, or after, by the use of ordinary diligence, they could have discovered the crossing, failed to exercise such care to avoid the danger as a prudent man would have exercised under like circumstances," they could not recover. The husband admitted in his testimony that he saw the crossing before he started his wagon down the declivity, and at a point some 50 or 60 feet from the railroad track; and testified that, before attempting to cross over, he looked for approaching trains, but saw none. Before this there was no danger to be encountered, and we are at a loss to conceive what diligence he was called upon to exercise prior to this time. Can it be seriously contended that he should have been on the outlook merely because he was moving parallel to the railroad track? If the court had so charged, the charge would have been misleading, and fatal to the judgment if the verdict had been against the plaintiffs.

Same—Duty to look and listen.

It is also insisted that the court, instead of charging generally that plaintiffs could not recover if they failed to exercise ordinary care in approaching the crossing, or at least, in addition to such charge, should have instructed the jury that it was the duty of plaintiffs, as they approached the track, to look and listen for coming trains. But we think the charge as to contributory negligence of plaintiffs, as given, in general terms, sufficient. According to the rule of decision in this court, except in case of a failure to perform a statutory duty, negligence is very rarely a question of law. It is most usually a question of fact, the determination of which depends upon the circumstances of each particular case. Railway Co. *v.* Murphy, 46 Tex. 356. In the case cited, it was held that an instruction to the jury which told them that certain acts on part of the servants of the railroad company were negligence was error, and is authority for holding that a more specific charge upon the alleged contributory negligence was not required in this case.

The tenth assignment is that "the court erred in its last clause of its charge, which excluded from the minds of the jury the alternative of finding for the defendant by emphasizing their finding for the plaintiffs." The answer to this is that the court did not, in the paragraph complained of, instruct the jury to find for plaintiffs.

Emphasizing finding for plaintiff.

The instruction merely gives the rule of damages "if, under the instructions given, and the evidence," the jury "should find for the plaintiffs." The twelfth assignment of error does not specify the particular special charges the refusal of which is complained, and is too general to be considered.

An exception was taken to the language of one of the counsel for plaintiffs used in closing argument to the jury. The language was not objected to when uttered, and the judge states in the bill of exceptions that his attention was engrossed at the time in the preparation of his charge, and that he only heard one of the remarks of which complaint is made, and that this he promptly checked. Without passing upon the question whether the language is of such a character as would require a reversal under any circumstances, we will say that the remarks were not so plainly prejudicial to defendant as to demand that the verdict be set aside, in the absence of an objection by its counsel at the time the words were spoken.

Argument of counsel.

In reference to the assignments which, in effect, submit that the verdict of the jury is contrary to the law and the evidence, it is sufficient to say that the testimony was conflicting, and that therefore the verdict should not be disturbed. If the jury believed the testimony of the plaintiffs, they could not have come to any other proper conclusion. The last assignment, that "the court erred in overruling defendant's motion for a new trial, and in refusing a new trial," is sufficient, because too general. It is presumed that it merely intended to show that the questions raised by the prior assignments were presented to the court below on the motion of a new trial.

There is no error in the proceedings of the court below, and the judgment is affirmed.

Injury at Crossing—Contributory Negligence.—See, *ante*, Louisville & N. R. Co. *v.* Schuster, 407, and note, 411.

PETRIE

v.

COLUMBIA AND GREENEVILLE R. CO.

(*South Carolina Supreme Court, October* 9, 1888.)

Negligence—Negligent Killing—Evidence—Coroner's Inquest.—In an action to recover damages for negligently killing plaintiff's intestate, the testimony of witnesses taken before the coroner's inquest cannot competently be admitted, even though offered at a second trial of the cause, after it has been admitted without objection at the first trial.

Same—Nonsuit—Province of Jury.—Plaintiff's intestate was killed at a railroad-crossing on a day on which there was a high wind blowing. She had her head wrapped up, probably to protect her from the cold wind. The wind came from a direction opposite to that from which the train approached. On approaching the crossing the whistle was blown, but not continuously, until the train reached the crossing, as required by statute. *Held*, that a motion for a nonsuit on the ground that there was no evidence to show that the intestate's death was the result of defendant's failure to give the statutory signals, was properly refused, as the deceased might not have heard the signal actually given, but possibly might have heard the signal which ought to have been given.

Same—Nonsuit—Contributory Negligence.—Contributory negligence being a matter of defence which must be proved to the satisfaction of the jury, it cannot constitute a ground for a nonsuit.

Same—Action by Children—Beneficial Interest in Deceased's Life.—Under the provisions of the South Carolina Gen. Stat., § 2184, the children of a person negligently killed may maintain an action to recover damages, although at the date of the killing the whole of the plaintiffs were adults having no legal claim on the deceased for their support.

Same—Instruction—Illustration.—If the trial judge, after defining gross negligence in accurate terms, proceeds to submit the question of fact to the jury whether the deceased was guilty of gross negligence in attempting to cross a railroad track, and illustrates his remarks by stating the case of one going upon a track for the purpose of committing suicide, adding: "That would be an extreme case of wilfulness" such charge is not misleading as leaving the jury to infer that there could be no gross negligence on the part of the deceased, unless she went upon the track for the purpose of committing suicide.

Same—Statutory Signals.—Except in a case of sudden and unexpected emergency, the fact that the engineer of the locomotive was otherwise engaged upon it, and therefore did not give the statutory signal on approaching a highway crossing, is no justification to a railroad company.

Same—Province of Court—Jury.—After the trial judge has properly defined negligence and gross negligence, it is the exclusive province of the jury to determine whether the facts proved in a given case constitute negligence or gross negligence, and it is not error for the court to refuse to instruct the jury specifically with reference to the actions of the deceased in attempting to cross in front of an approaching train, or in regard to her duty to look and listen.

Same—Damages—Funeral Expenses.—In an action to recover damages for negligently killing plaintiff's intestate, funeral expenses properly constitue an element in estimating the amount of damages.

APPEAL from Common Pleas Circuit Court, Spartanburg County.

Action by John Petrie as administrator of Margaret W. Petrie, deceased, against the Columbia & Greeneville R. Co. to recover damages for negligently killing the intestate. The defendant appeals from a judgment of the plaintiff.

Duncan & Sanders and *John C. Haskell* for appellant.

J. S. R. Thomson for appellee.

MCIVER, J.—The plaintiff brings this action, as administrator of Margaret W. Petrie, to recover damages in behalf of her children for injury sustained by them by reason of her death, caused by the alleged negligence of the defendant company.

Facts.

The testimony on behalf of the plaintiff tended to show that the deceased was a widow lady, about the age of 79 years, living with her son-in-law very near the track of the railroad; and that she was killed by a passenger train while attempting to cross the track of the railroad at or near a point where it was intersected by a highway. At the time of her death she left several children, none of whom were minors, but they had all been settled off to themselves several years before the death of their mother. The old lady had a small income, sufficient for her own support, derived from the rent of her land; but at the time of her death she was living with her daughter, who had been in bad health for several years, and whose husband was also disabled; and was attending upon them. The testimony tended to show that the deceased was quite active and vigorous for a person of her years, and was in the habit of rendering valuable services to her children and grandchildren, especially in cases of sickness, as she claimed to have read and to have some knowledge of medicine. There was, however, no distinct evidence of the value, in dollars and cents, of her services; the testimony being, in general terms, that her services were of value to her children in saving them physicians' bills, and in many ways being of material assistance to them; and there was also evidence that she was in the habit of assisting one of her sons, who had been disabled in the war, by giving him money and other things. The evidence tended to show that the country was open at the place where the disaster occurred, and that an approaching train could be seen and heard for a considerable distance; though there was also evidence that, on the side of the track from which the deceased was probably returning at the time she

met her death, the view, at one point, was obstructed by a depression in the ground, and by a sort of embankment, or mound, as the witnesses called it, upon which wood was piled for the train; and also that there were some trees or bushes near the track, which, it was claimed, obstructed the view. The day on which the disaster occurred (15th March, 1884,) it was cold and windy, the wind blowing down the road in a direction opposite to that from which the train approached; and when the body of deceased was found her head was tied up with a veil and shawl, and she had on a large bonnet. The testimony was that when the train reached the whistle-post, some distance below the highway crossing, but how far was not shown, there were three or four short blows of the whistle on the engine, but there was no ringing of the bell, and the whistle was not kept blowing until the engine had crossed the highway.

At the close of plaintiff's testimony counsel for defendant moved for a nonsuit upon the grounds hereinafter more particularly stated, which motion was refused. The defence then went into their testimony, and first offered the testimony of Mrs. Neighbours, taken before the coroner's inquest, which at a previous trial of this case had been offered by the defence, and received then without objection. Plaintiff's counsel objected, and the testimony was ruled out. Counsel for defendant then offered the testimony of B. F. Eaker, the engineer of the train which caused the death of plaintiff's intestate, which had been offered in evidence by the defendant on a former trial of this case, and received then without objection. This testimony was objected to by counsel for plaintiff, and was likewise excluded. After other testimony had been offered in behalf of the defence, for the purpose of showing that the death of deceased was not caused by any negligence on the part of the defendant company, but was due to her own gross negligence, the case was submitted to the jury, under the charge of the court, who rendered a verdict in favor of the plaintiff for $850. Defendant's counsel then submitted a motion for a new trial upon grounds which are mostly embraced in defendant's ninth, tenth, and eleventh grounds of appeal. This motion was also refused, and, judgment having been entered in favor of plaintiff, defendant appeals, and moves for a reversal of said judgment for the following alleged errors therein. "(1) In overruling defendant's motion for a nonsuit. (2) In not admitting in evidence the testimony of Mrs. Neighbours. (3) In not admitting in evidence the testimony of B. F. Eaker. (4) In charging: 'Was Mrs. Petrie guilty of gross or wilful negligence . . . when the killing occurred? . . . Did she go upon that track wilfully? Did she put herself wilfully there with that intention? Wilful negligence, gentlemen, is where one

Assignment of errors.

wilfully places himself in a place of known danger, as was illustrated to you in the case of one going upon a track for the purpose of committing suicide.' (5) In charging: 'It is not necessary that any witness should have testified to the value in dollars and cents of these services.' (6) In charging: 'In this action, if the defendant is liable, funeral expenses of deceased may properly be considered as among the elements of damage, if it is satisfactorily proven that the plaintiff has paid the same.' (7) In charging: The failure to blow the whistle or ring the bell, as required by statute, if such failure existed, would be negligence in the defendant, whether that failure occurred by reason of the employment of one of its officers in arranging some other parts about the machinery or not.' (8) In charging: 'If a person should voluntarily put himself or herself upon the track, and the engineer sees that person, it is his duty to endeavor to stop the train. To make no such effort when he saw such person would be gross negligence.' (9) In refusing to charge: 'If the deceased saw and heard the train approach the crossing, and notwithstanding this undertook to cross the track of defendant in front of this train, and but for this act of hers she would not have been killed, then the plaintiff cannot recover.' (10) In refusing to charge: 'It is the duty of a person approaching a railroad crossing, in order to avoid danger, to stop, and look and listen; and if the deceased failed to use her sense of sight and hearing, and walked upon the track of an approaching train in plain sight and hearing, and but for this act of hers would not have been killed, then she was guilty of such negligence as will defeat the plaintiff's right to recover.' (11) In refusing to charge: 'If Mrs. Petrie saw or heard the train approaching, or if she, by the exercise of reasonable care, could have seen or heard it, then the defendant is not liable, even though it failed to blow the whistle or ring the bell, as required by the statute.' (12) In refusing to charge: 'Even if the jury are satisfied in this case that the engineer was guilty of great negligence and want of care, yet the plaintiff cannot recover if the deceased was also guilty of contributory negligence; that is to say, that she did not observe proper care under the circumstances.' (13) In refusing to charge: 'If the deceased failed to observe proper care under the circumstances, the plaintiff cannot recover.' (14) In refusing to grant defendant's motion for a new trial."

The second and third grounds of appeal, relating to the admissibility of testimony, will be considered together, as they are really governed by the same principle. There can be no doubt that the testimony of these two witnesses, taken before the coroner's inquest, was originally incompetent evidence in this case. Even on the trial of the party charged with the murder of the person over whose

Evidence—Testimony at coroner's inquest.

dead body the inquest was held, the testimony of a witness taken at such inquest, and who has since died, has been held incompetent (State *v.* Campbell, 1 Rich. Law 124), and certainly such testimony is not admissible on a trial between persons who were not parties to the inquest, and had no legal connection therewith. Indeed, as we understand it, this proposition is conceded; but it is contended that, inasmuch as this confessedly incompetent testimony was received without objection on the former trial of this case, it has thereby been made competent to introduce it in this trial, upon the well-settled principle that, where incompetent testimony has been received without objection at the time it is offered, it thereby becomes competent. Burris *v.* Whitner, 3 S. C. 510, and many other cases to the same effect. But whether that principle can be applied to this case is what we are now called upon to determine. To so apply it would, it seems to us, ignore the nature and effect of a new trial, which is a trial *de novo*, and is conducted just as if there had been no previous trial. Neither party can rely upon the testimony as taken at the previous trial, nor is he bound thereby. On the contrary, each party must offer his evidence anew, just as if there had been no previous trial, and when it is so offered it necessarily becomes subject to any legal exception which may be taken to it. Hence, while the testimony in question became competent in the former trial, because it was not objected to when offered, yet, having been objected to when offered at the last trial, it was properly excluded as incompetent on such trial. See 1 Greenl. Ev. § 163, and cases cited in note 1.

Nonsuit—Plaintiff's contributory negligence—Province of jury.

The first ground of appeal imputes error to the circuit judge in refusing the motion for a nonsuit. That motion was based upon the following grounds: "First, because plaintiff has failed to show affirmatively any negligence on the part of defendant, causing the death of Mrs. Petrie; second, because plaintiff has failed to show that the failure to ring the bell or blow the whistle continuously caused or contributed to the death of Mrs. Petrie; third, because the facts show that the accident was caused by the gross negligence of the deceased; fourth, that the plaintiff has failed to show any beneficial interest or pecuniary loss to her children." It will be observed that the phraseology used in all these grounds is open to objection when the question is as to a motion for a nonsuit; for in such a case the inquiry never is whether the evidence shows the existence of a fact material to the plaintiff's case, as the question whether such a fact has been shown is a question exclusively for the jury. The true inquiry is whether there is any evidence tending to show the existence of such facts as are material to the case of the plaintiff; and this inquiry is not presented by any one of

these grounds. But waiving this, and assuming that the questions were presented in proper form, we will proceed to consider them. The first two grounds are doubtless based upon the theory that while the failure to ring the bell or blow the whistle continuously until the engine had crossed the highway might be evidence of negligence on the part of the defendant, yet there was no testimony tending to show that such negligence caused the death of Mrs. Petrie, or in any way contributed thereto; for in the face of the express terms of the statute (Gen. St. § 1483), requiring that the bell should be rung or the whistle sounded at a distance of, at least, 500 yards from the point where a railroad crosses a public highway, and kept ringing or sounding until the engine has crossed such highway, and in view of the undisputed testimony that this positive requirement of the statute was not complied with, it could scarcely be denied that there was evidence of negligence on the part of the defendant. But it being true, as contended for by appellant, that it is not sufficient to make out plaintiff's case that there should be simply evidence of defendant's negligence, but that there must also be some evidence that the injury complained of was the result of such negligence (Glenn *v.* Railroad Co., 21 S. C. 466), we will proceed to inquire whether there was any evidence tending to show that the failure on the part of the defendant to give the signals required by statute in any way contributed to the injury complained of. We think there was some evidence tending to show that fact; and whether it was sufficient or not was not for the circuit judge to determine on a motion for nonsuit, but was exclusively for the jury, to whom it was properly left. The testimony is all set out in the case, and we cannot go over it with a view of vindicating our conclusion. It is sufficient to say that the circumstances indicated by the circuit judge, in refusing the motion for a nonsuit, afforded some evidence that, if the requirements of the statute had been complied with, the disaster might not have occurred. The high wind blowing at the time from a direction opposite to that from which the train was approaching, together with the manner in which the old lady's head was wrapped up, probably to protect her from the cold wind, may have been sufficient to prevent her from hearing the signal which was given, and may not have been sufficient to have prevented her from hearing the signal which ought to have been given. We cannot say, therefore, that there was absolutely no evidence tending to show that the injury complained of was the result of the negligence in failing to give the signal as required by the statue.

The third ground clearly cannot be sustained, for it has been frequently held that contributory negligence is a matter of defence, which must be proved to the satisfaction of the jury, and

cannot, therefore, constitute a ground for a nonsuit. Carter *v.* Railroad Co., 19 S. C. 20; Darwin *v.* Railroad Co., 23 S. C. 531; and many other cases.

We come next to the fourth ground of the motion for a nonsuit; and, construing it in the same liberal spirit, it presents the inquiry whether there was any evidence tending to show that the parties for whose benefit this action is brought—the adult children of the deceased—had any beneficial interest in her life, or suffered any pecuniary loss by her death. It would be sufficient for the present inquiry to say that there was some evidence that the deceased was in the habit of rendering services to her children which were of value to them, and that would be enough to carry the case to the jury. It is contended, however, that, unless the children had some legal claim on the deceased for their support, no damages can be recovered for their benefit; and as the children of deceased were all adults, living to themselves, they could not possibly have any such claim. This view is based upon the idea that the "injury" spoken of in the statute means only the deprivation of a legal right. This, it seems to us, is a narrow view of the statute; and, on the contrary, its language repels any such view. There is not only no language in the statute which requires such a restricted signification to be placed upon the word "injury," but some of its terms indicate that such was not the sense in which the word was used. The language of section 2184 of the General Statutes is as follows: "Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been caused, . . . and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate." Now, it will be observed that the provision is that the damages recovered, in case there are only children left, shall be divided equally among all of the children, whether some of them be minors or not; and this negatives the idea that the claim for damages rests upon the theory that the beneficiaries have been deprived of some legal right; for, in the case supposed, while minor children would have a legal claim on their father for support, the adults would have no such claim, and yet by the terms of the statute no distinction is made. Again it will be noticed that our statute, unlike many others of a similar character, does not speak of "pecuniary" loss or injury, which word might possibly tend to

Action by children—Interest in life of deceased.

show that the injury for which damages are allowed was confined to the deprivation of some legal claim susceptible of measurement by a pecuniary standard; but its language is broader, and gives the jury the right to award "such damages as they may think proportioned to the injury resulting from such death;" and as it is quite certain that the beneficiaries of the action may sustain injury, by the death of a relative, over and above the loss of any legal claim which they may have upon such relative, it follows that the view contended for cannot be sustained. The conclusion which we have reached is sustained by high authority. In the case of Railroad Co. *v.* Barron, 5 Wall 90, the view contended for by the appellant was pressed by counsel in an elaborate argument; but the court held that it was not necessary that the beneficiaries should have had a legal claim on the deceased, if he had survived, for their support. Our view is also supported by many other authorities cited in respondent's argument. Indeed, in the case we have cited from 5 Wall, *supra*, Nelson, J., in speaking of the view contended for by appellant, says: "This construction, we believe, has been rejected by every court before which the question has been presented." It is quite clear, therefore, that there was no error in refusing the motion for a nonsuit.

Instruction—Illustration—Committing suicide.

The language of the charge excepted to in the fourth ground of appeal is only partially quoted, and the purpose of it seems to be to convey the idea that the circuit judge intended the jury to understand, or left them to infer, that there could be no gross negligence on the part of the deceased, unless she went upon the track for the purpose of committing suicide. But when the entire paragraph, from which these extracts are taken, is read (and for the purpose of a full understanding of the several exceptions the entire charge should be embraced in the report of the case), it is plain that no such inference was open to the jury; for the judge, after defining "gross negligence" in terms to which no exception has been taken, proceeded to submit the question of fact to the jury whether Mrs. Petrie was guilty of gross negligence. What he said about suicide was only as an illustration, and was properly qualified by the following remark: "That would be an extreme case of wilfulness."

Failure to give signal—Excuse.

That portion of the charge excepted to in the seventh ground of appeal, taken in the connection in which it was used, was clearly not erroneous. Where the statute requires a certain duty from a railroad company, the failure to perform such duty cannot be excused where the company has failed to provide a sufficient number of officers or agents to perform that and other necessary services in running the train. Hence the fact that the engineer was en-

gaged in arranging the air-pump while approaching the crossing, and for this reason failed to give the signal required by statute, would be no excuse for such failure; unless it was shown, as the judge suggested, that the necessity for working on the pump arose from a sudden and unexpected emergency; and there was not only no evidence of this, but, on the contrary, the testimony shows that this work might just as well have been done before approaching or after leaving the highway crossing.

That portion of the charge which forms the basis of the eighth ground had no application whatever to the case as made by the testimony, and was purely speculative. Hence, conceding that there was error in telling the jury that a supposed state of facts would constitute gross negligence, it is quite certain that such error could not possibly have affected the result in this case; for there was not only no evidence whatever that the engineer saw the deceased on the track in front of his train, but, on the contrary, the uncontradicted evidence is that neither the engineer, nor any other officer connected with the train, knew that she had been run over or knocked off the track.

Negligence—Province of court and jury.

The requests to charge in the ninth, tenth, and eleventh grounds of appeal, which also constitute the principal grounds for the motion for a new trial, were properly refused. The fundamental vice in all of these requests is that they called upon the judge to pass upon questions of fact. The rule, as we understand it, is that the province of the judge is to give to the jury a definition of the term "negligence," or "gross negligence;" and then it is the exclusive province of the jury to determine whether the facts proved, in a given case, constitute negligence or gross negligence. Bridger *v.* Railroad Co., 25 S. C. 30, 31. As is well said by the chief justice in that case, in speaking of this matter of negligence: "All agree as to the general definition,—the absence of ordinary care. But who is to say whether the facts alleged and proved show this absence,—the judge or the jury? The judge is required to charge the law, and the jury to find the facts. The law, however, does not state what facts proved will show the absence of ordinary care. It could not do so as applicable to every case which arises. The cases involving this question are so different in their facts, so various, so complicated, and arising under so many different circumstances, that it would be utterly impossible to lay down any general principle of law, by which every special case could be measured and tested as to the fact of negligence, and which would enable a judge to say to the jury, as matter of law, such and such facts show the absence or presence of ordinary care;" and then he lays down the rule substantially as we have stated it. Of course the same rule applies where the question is as to gross negligence as in cases of

ordinary negligence. This being the rule, it follows that the circuit judge committed no error in refusing to charge that the existence of certain facts precluded the plaintiff's right to recover; for that would, in effect, have been a charge that a given state of facts constituted gross negligence, whereas that was a question for the jury. It will be observed that the question is not whether the judge erred in simply refusing to instruct the jury that it was the duty of a person approaching a railroad crossing to use his senses of sight and hearing in order to protect himself from the danger of a collision, but the question is whether he erred in refusing to go further, and instruct the jury that such failure was gross negligence, and would, in this case, defeat the plaintiff's right to recover.

The requests to charge which constitute the basis of the twelfth and thirteenth grounds of appeal were not really refused. The statute (Gen. St. § 1529) provides that where a person is injured by a collision with a railroad train, at a highway crossing, by reason of the negligence of the company to give the required signals, the company shall be liable for the damages thereby sustained, "unless it is shown that, in addition to a mere want of ordinary care, the person injured . . . was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law; and that such gross or wilful negligence or unlawful act contributed to the injury." Nothing is said in the act about observing proper care; and hence the circuit judge, in dealing with these requests, declined to adopt the word "proper," but, following the language of the statute, instructed the jury, as he had done before, that if the deceased was guilty of gross negligence, which contributed to the injury, then she could not recover; and that taking the words, "if she did not observe proper care," to mean that she was guilty of gross negligence, then the request was good law. In this there certainly was no error, for he simply translated the incorrect language of the request into the more accurate terms employed in the statute.

Instruction refused—"Proper care."

The fourteenth ground of appeal has already been considered, except in so far as the motion for a new trial was based upon the ground that the damages given were excessive. It is so well settled that the decision of the circuit judge upon this point is final that it is only necessary to refer to some of the cases. Steele *v.* Railroad Co., 11 S. C. 589, and the cases therein cited.

It only remains to consider the questions raised by the fifth ground of appeal, as to the mode of proving the amount of the damages; and by the sixth ground, as to the elements which may enter into the estimate. As to the former question, it is very obvious that in many cases, slander, etc., it is impossible to show by evidence the

Damages—Funeral expenses.

amount, in dollars and cents, of the damages sustained; and yet we have never heard it suggested even that the inability to do this precludes the jury, when the facts and circumstances are laid before them, from making their own estimate of the amount of the damages recoverable in such cases, and we see no reason why the same cannot be done in a case like this. Even if witnesses had undertaken to testify as to the amount of damages, in dollars and cents, which the beneficiaries in this action had sustained by the loss of their mother, such testimony could only have been the opinions or estimates of such witnesses, based upon the facts and circumstances of the case, and it seems to us that the jury was quite as competent to make such estimate as the witnesses would have been. See what is said upon this subject by Nelson, J., in Railroad Co. *v.* Barron, *supra*. As to the other question,—whether the funeral expenses could properly constitute an element in estimating the amount of the damages,—it seems to us that the authorities cited by respondent's counsel in his argument fully sustain the ruling of the circuit judge. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C.J., and MCGOWAN, J., concur.

Highway Crossing—Negligent Killing.—See, *ante*, State to use of Harvey *v.* Baltimore & O. R. Co., 412; Duame *v.* Chicago & N. W. R. Co., 416; International & G. N. R. Co. *v.* Kuehn, 421.

Same—Contributory Negligence.—See, *ante*, Louisville & N. R. Co. *v.* Schuster, 407, and note, 411.

Same—Statutory Signals.—As to the common law and statutory duty of railroad companies to give warning signals on approaching highway crossings, see *ante*, Omaha, N. & B. H. R. Co. *v.* O'Donnell, and note.

Approaching Crossing With Head Muffled up.—See note, 32 Am. & Eng. R. R. Cas. 155.

PENNSYLVANIA CO.

v.

SLOAN.

(*Illinois Supreme Court, May* 9, 1888.)

Highway-crossing—Personal Injuries—Pleading—Misnomer.—A suit was begun by a summons against the P. F. W. & C. R. Co., which was served on M. as agent. After the expiration of the statutory period for bringing suit, leave was given to plaintiff to amend by substituting the P. Co. in the place of the P. F. W. & C. R. Co. The summons issued after the amendment, was served on the P. Co. by reading to M. as agent. The P. Co. pleaded that the action had not been commenced against it within the statutory period. It appeared that, previously to the injury, the railroad

was owned by the P. F. W. & C. R. Co.; that the road was sold under foreclosure proceedings against that company, and purchased by the P. F. W. & C. R. Co. The purchaser operated the road for a short time, and then leased it to the P. Co., assignee. At the time of the accident, the P. Co. was operating the road and running the cars. The cars on the track at that time, and locomotives and sign-boards, were marked "P. F. W. & C. R. R." M. was the general freight agent of the P. Co.; and the officers of the latter company were consulted about the accident, and made reports with reference to it, to the main office. The P. Co.'s attorney filed the plea in defence of the original suit. *Held*, that such evidence was competent for the purpose of proving the real party in interest, and that the action might be maintained against the P. Co.

Same—Pleading—Statute of Limitations—Separate Counts.—If an ordinary declaration alleges the injuries to have been caused by the moving of a locomotive, whilst an amended declaration filed after the lapse of the statutory period alleges the improper signalling of a flagman as the further cause of the injury, thus forming separate averments in separate and distinct counts, a plea, of the statute of limitations, to the whole declaration does not raise the question of the statutory bar as applied to the allegation of the negligence of the flagman.

APPEAL from Appellate Court, First District.

Action by George M. Sloan, to recover damages for personal injuries caused by the negligence of the defendant's employees. The defendant appeals from a judgment of the appellate court affirming a judgment of the circuit court for the plaintiff. The opinion states the case.

George Willard for appellant.

John Lyle King for appellee.

MAGRUDER, J.—This suit was commenced in the circuit court of Cook county on July 3, 1874, by the appellee, to recover damages for personal injuries received July 5, 1872. On the latter day, appellee was riding in a buggy westward on Eighteenth street in the city of Chicago, and came to Stewart avenue, along which the railroad tracks of the appellant, 10 or 12 in number, run, from north to south and from northeast to southwest. He was stopped by a train passing on one of the tracks farthest to the west, and waited for some time for an opportunity to get across. A number of stationary cars standing on one of the easterly tracks south of Eighteenth street obstructed his view of the tracks between the stationary cars on the east and the moving train on the west. When the latter train had passed, he was signalled to come on, and motioned to hurry up, by the flagman, whose duty it was to give signals of the movements of the cars and engines. Before he could cross the network of tracks, a train backing up from the south, and theretofore hidden by the stationary cars, stopped his further progress by moving directly in front and so near as to touch the horse's head. The horse became frightened, and reared and plunged, and backed the buggy towards the east,

Facts.

where it was in danger of colliding with a locomotive advancing from the north in appellee's rear. In this state of affairs, the whistle of the locomotive was suddenly blown and increased the fright of the horse. In peril of his life from the train in front of him, the locomotive in the rear of him, and the plunging of the frightened horse, appellee jumped from the buggy and received the injuries complained of.

The declaration charges that the servants of appellant were guilty of negligence in signalling appellee to advance across the tracks when an approaching train, that he could not see, made it unsafe to do so; and in driving the locomotive along the track at that time, needlessly and improperly blowing its whistle. The suit, as originally begun by summons issued on July 3, 1874, was against the Pittsburgh, Fort Wayne & Chicago R. Co. The *alias* summons, dated July 23, 1874, was served, July 31, 1874, on R. C. Meldrum as agent. The original declaration was filed, August 10, 1874; to which the general issue was pleaded. The first trial was had in April, 1876, and resulted in a verdict of $3000. A new trial was granted. The second trial took place in November, 1876, and resulted in a verdict of $4000. A new trial was again granted. The third trial began on March 26, 1877; but on March 27, 1877, leave was given to plaintiff to amend by substituting the Pennsylvania Co. in place of the Pittsburgh, Fort Wayne & Chicago R. Co. A juror was withdrawn, and the cause continued. The summons issued and dated on March 27, 1877, was served on March 28, 1877, on the Pennsylvania Co. by reading to R. C. Meldrum, agent. March 27, 1877, an amended declaration was filed, consisting of five counts, to which the Pennsylvania Co. filed two pleas,—first, general issue; second, statute of limitations,—the latter plea being that action did not accrue within two years next before suit was brought. To the second plea four replications were filed, each of which was demurred to, and demurrer sustained as to second and third, and overruled as to first and fourth. Issue was joined on the first replication, and two rejoinders were filed to the fourth. The rejoinders were demurred to, but the demurrer was overruled, and plaintiff elected to stand by it. June 4, 1877, an order was entered substituting the Pennsylvania Co. for the Pittsburgh, Fort Wayne & Chicago R. Co. In September, 1877, a third trial was had, resulting in verdict and judgment for $3000. An appeal was then taken to the appellate court, where the judgment was reversed and the cause remanded. The mandate was filed in October, 1880. Afterwards, in January, 1885, leave was granted to plaintiff to withdraw all replications then on file, and to file new replications to the second plea; upon the first of which issue was joined, and to the second and third of which rejoinders were filed and demurred to. A fourth trial was begun,

in September, 1885, but plaintiff withdrew a juror, and the cause was continued. The fourth trial was, however, again begun, and finished in November, 1886, and resulted in verdict and judgment for $5000. The latter judgment has been affirmed by the appellate court, whence it comes before us by appeal.

The first of the new replications to the second plea averred that the defendant, the Pennsylvania Company, was a foreign corporation, possessed of and operating solely and exclusively the Pittsburgh, Fort Wayne & Chicago Railroad, extending from Chicago to Pittsburgh, and all the cars, etc., and the servants, etc., of the defendant, and the causes of action mentioned in the declaration, were solely caused by the negligence of defendant's servants, etc.; that Meldrum was local and general agent of defendant in Chicago, and on July 3, 1874, plaintiff sued out summons, and impleaded defendant in the name of the Pittsburgh, Fort Wayne & Chicago R. Co. (the said Pennsylvania Co. being known and reputed as the Pittsburgh, Fort Wayne & Chicago R. Co.), that the *alias* summons against defendant in the reputed name of Pittsburgh, Fort Wayne & Chicago R. Co. was served July 31, 1874, on Meldrum, as agent of Pennsylvania Co.; that the Pennsylvania Co. appeared by its solicitors, and, without pleading in abatement, pleaded to the merits, etc. The replication then sets forth the trials in April and November, 1876, the amendment and substitution of March, 1877, the issuance of summons in March, 1877, against the Pennsylvania Co., and its service on Meldrum, as agent of that company, etc., and concludes as follows: "And so plaintiff says this suit is the same suit commenced against defendant in name of Pittsburgh, Fort Wayne & Chicago R. Co., and that said causes of action accrued within two years before commencement of suit." If the suit had been begun against the Pennsylvania Co. by that name, it was undoubtedly commenced in time to escape the bar of the statute. The theory of the appellant is that the action, having been begun against the Pittsburgh, Fort Wayne & Chicago R. Co. was not begun against the Pennsylvania Co.; and that the bar of the statute was complete as to the latter company, because it was not made a party until 1877, more than two years after the cause of action accrued. To answer this position, appellee contends that the Pennsylvania Co. was the company sued in the first place, but that it was merely sued by the wrong name, to-wit, by the name of the Pittsburgh, Fort Wayne & Chicago R. Co. The law undoubtedly is that, where the real party in interest, and the one intended to be sued, is actually served with process in the cause, even though under a wrong name, he must take advantage of the misnomer by plea in abatement in such suit; and, if he does not, he will be con-

Parties—Misnomer.

cluded by the judgment or decree rendered, the same as if he were described by his true name. Pond *v.* Ennis, 69 Ill. 341. If the Pennsylvania Co. was the real party sued and served, though by the wrong name, it should have pleaded the misnomer in abatement. It did not do so. The first plea filed was to the merits. The issue made upon the plaintiff's replication to defendant's second plea was whether or not the Pennsylvania Co. was sued and impleaded by a wrong name, and served with summons under a wrong name. The issue then made was one of fact, and was submitted to the jury along with the other facts. This question of fact, no less than the other questions of fact, is settled and determined, so far as we are concerned, by the judgment of the appellate court. Defendant upon the trial introduced no evidence whatever under either plea. All the proof in the record was put in by the plaintiff. The latter called to the stand and examined several of appellant's officers, agents, and attorneys. It appeared from their testimony that foreclosure proceedings were instituted against the Pittsburgh, Fort Wayne & Chicago R. Co. in 1867, or at some date prior thereto. That the road was sold out under decree in such proceedings, and purchased by the Pittsburgh, Fort Wayne & Chicago R. Co., which was thenceforward its owner. That thereafter the Pittsburgh, Fort Wayne & Chicago R. Co., ceased to do business, ran no cars, operated no road, and simply retained an organization for the purpose of closing up its affairs. That the Pittsburgh, Fort Wayne & Chicago R. Co. operated the road until June 7, 1869, and then leased it to the Pennsylvania R. Co.; which latter company assigned the lease, in 1870 or 1871, to the appellant, the Pennsylvania Co. That the appellant was operating the road and running the cars when the accident occurred, and when the suit was brought. That the cars on the track at that time were marked "P., Ft. W. & C. R. R.," and "R. W." The sign-boards were marked "P., Ft. W. and C. Co." The initials "P., Ft. W. & C. Ry." were on the locomotives. The same lettering was on the windows of the freight and ticket offices, though the name of the Pennsylvania Co. was also on the transom over the door, and on some of the windows. That Meldrum was general freight agent of appellant. That the officers of appellant were consulted about the accident, and made reports in reference to it to the main office in Pittsburgh. That appellant's attorney filed the original plea and defended the original suit, etc. There was also testimony tending to show that the plaintiff intended to sue the company, which was running the cars at the time the injury was committed, and which was employing the servants charged with the negligence complained of, and it is undisputed that that company was none other than the appellant. This testimony,

which was strenuously objected to by appellant's counsel, was competent as bearing upon and tending to prove the issue of fact made upon the replication to the second plea. Indeed, it would seem to have been difficult for any ordinary man to find out just what name, among the many names made use of, was the real name of the company whose servants were in charge of the cars and the tracks at the time appellee was injured. We do not think that the objections made by appellant to the instructions which were given upon the subject of the plea of the statute of limitations are well taken. These objections fall with the objections to the testimony already referred to. The instructions in relation to the plea were based upon the testimony tending to show the use of the wrong name, and merely told the jury, in substance, that the statute of limitations did not apply, if the facts set up in the replication, as above stated, should be found from the evidence to be true. While the Pittsburgh, Fort Wayne & Chicago R. Co., appellant's lessor, may have been liable for the injury, yet appellant, the lessee, was also liable. The railway company was not sued. The defendant originally sued was called the "Pittsburgh, Fort Wayne & Chicago Railway Company." As the corporation formerly known by that name was virtually defunct, and existed only to wind up old business, and not to attend to new business, appellant's officers and agents could not have supposed that corporation to have been the defendant intended to be sued, when service was had upon appellant's own representative in Chicago.

Instruction as to flagman's signal.

The seventh instruction given for plaintiff begins with these words: "If the jury believe, from the evidence, that a flagman of the defendant improperly and inopportunely signalled the plaintiff's team," etc. This language is criticised upon the alleged ground that it bases the right of recovery, not upon the negligence or carelessness of defendant's servant, but upon the question whether or not such servant performed his duty in an improper and inopportune manner. The words "carelessly" and "negligently" are in the declaration, and, if they had been added to the words used in the instruction, the latter would have been more technically accurate. But we do not think it was sufficiently inaccurate to mislead the jury. "Improper" means "not fitted to the circumstances;" "inopportune" means "unseasonable in time," or "at the wrong time." If the flagman signalled to the plaintiff to come on, when the circumstances were such as to require him either not to signal at all, or to signal for a further waiting, or if the flagman signalled to plaintiff to come on at a time when a train, unseen by plaintiff, but which the flagman was bound to observe, was moving near and directly towards the team, then such flagman was guilty of negligence in the

performance of his duty. Moreover, the fifth instruction had called attention to the case of one person being put in peril by the "negligence and misconduct" of another, and had directed inquiry to the question whether the plaintiff, in the exercise of ordinary care, had been compelled by "the negligence of the defendant" to jump from his buggy.

The seventh instruction is also objected to as basing the right of recovery solely upon the action of the flagman, and not upon the action of the engineer in backing the locomotive and blowing the whistle. Inasmuch as the original declaration attributed the injury to the moving and whistling of the locomotive in the rear of the team, and to no other cause, while the amended declaration filed in 1877 added the improper signalling of the flagman as a further cause of the injury, it is therefore claimed that the amended declaration set up a new cause of action which came within the bar of the statute. Both declarations claim damages for the same injury, and for the same fright to plaintiff's horse. Without, however, passing upon the question whether the case comes within the principle announced in Railroad Co. *v.* Cobb, 64 Ill. 128, it is sufficient to say that the negligence of the flagman and the negligence of the engineer are separately averred in separate and distinct counts, though they are also charged together in one of the counts, and that the plea of the statute of limitations is to the whole declaration. Where separate causes of action are set up in separate counts, and defendant pleads the statute to the whole declaration, plaintiff is entitled to recover if one of his causes of action is not within the bar. 1 Chit. Pl. *546; Perkins *v.* Burbank, 2 Mass. 81. The evidence tends to establish negligence on both of the grounds mentioned in the amended declaration. To justify him in making the point now raised, the defendant should have pleaded separately to that portion of the declaration which has reference to the conduct of the flagman.

Pleading—Statute of limitations—Separate counts.

The ninth instruction given for the plaintiff tells the jury that if they "find the defendant guilty," they shall assess his damages, etc.; and then proceeds to state the elements that may be taken into consideration in fixing the amount of the damages. In regard to this instruction, counsel for appellant says: "The amount which the jury are thereby allowed to assess is not limited to any belief on their part as to what the testimony shows." The criticism is not warranted. The enumeration of such effects of the injury as may be compensated for in damages closes with the words, "as shown by the testimony." Previous instructions had stated that the defendant would be guilty if certain facts should be found from the evidence to be true. The finding of the defendant

Assessment of damage.

guilty as specified in the ninth instruction presupposed a belief, from the evidence, in the truth of the facts referred to in such previous instructions. The judgment of the appellate court is affirmed.

PALMER

v.

ST. PAUL AND DULUTH R. CO.

(*Minnesota, Supreme Court, May* 14, 1888.)

Crossing—Cattle on Track—Failure to Blow Whistle.—Where cattle lawfully upon a highway are killed by an engine at the crossing of a railway and the highway, evidence that the employees of the railway omitted to ring a bell or blow a whistle before reaching the crossing, as required by statute, is competent.

APPEAL from District Court, Chisago County.

Action to recover for negligently killing stock belonging to the plaintiff. Defendant appeals from a judgment for plaintiff.

O'Brien & O'Brien for appellant.

John W. Willis for respondent.

Appeal from justice—Review of evidence.

MITCHELL, J.—Gen. St. 1878, c. 65, § 117, provides that upon appeal from a justice of the peace upon questions of law alone, the action shall be tried in the district court upon the return of the justice. In Barber *v.* Kennedy, 18 Minn. 216 (Gil. 196), we held that the justice's minutes of the testimony were no part of his return; there being no statute requiring or authorizing the return of the evidence. Subsequently section 116 of chapter 65 was amended by providing "that, upon an appeal upon questions of law alone, the justice before whom the action is tried shall, upon the request of either party, return to the district court a true transcript of all the evidence given upon the trial, and the same shall be filed with the clerk of the district court as a part of the return of said justice." The evidence being now made a part of the return, we are of opinion that the appellant, upon such an appeal, may raise, as a question of law, the point that there was no evidence to justify the judgment. If there be any evidence reasonably tending to support it, the district court could not consider the question of preponderance. That would be a question, not of law, but of fact, which should only be determined upon a trial *de novo* upon an appeal upon questions of fact or of both law and

fact. Upon examination, we are of opinion that there was evidence reasonably tending to support the judgment of the justice, and therefore it was properly affirmed.

This is all that is necessary to be said on the case except upon one point. It was admitted that the animals were killed by defendant's trains on a crossing of its railroad and a public highway. So far as appears, the animals were lawfully on the highway. One of the acts of negligence complained of was the omission to give a signal of the approach of the train by ringing a bell or blowing a whistle before reaching the crossing, as required by the statute. Sp. Laws, 1861, c. 1, § 16. Appellant's contention is, in substance, that these signals are required and intended solely as a warning to human beings, and not to cattle, which are not supposed to be endowed with reason so as to understand their meaning. It is a matter of common knowledge and observation, and supported by evidence in this case, that the blowing of a whistle does often frighten cattle off a railway track, and is frequently resorted to by locomotive engineers for that purpose. When the legislature required the giving of these signals, they may be presumed to have intended them for any purpose which they might naturally or reasonably be supposed to subserve, including the driving of cattle from the railway track. Therefore we are of the opinion that evidence of the omission to give these signals was competent, and it was for the justice to say, under all the circumstances of the case, whether the giving of the signals would have prevented, and the omission to do so caused, the accident. 1 Thomp. Neg. 507, and cases cited. Judgment affirmed.

Injury to cattle—Signals.

Crossings—Warning Signals.—Respecting the common law and statutory duty of railway trains to give warning signals on approaching high way crossings, see, *ante*, p. 346, Omaha, N. & B. H. R. Co. *v.* O'Donnell, note, 349–351.

Same—Duty to Signal for Animals.—The signals required by statute are for the protection of stock as well as of man; and where, through the omission to give them, stock is injured upon a crossing, the railway company is liable in damages. Alabama & G. S. R. Co. *v.* McAlpine, 71 Ala. 545; s. c., 15 Am. & Eng. R. R. Cas. 544; Mobile & O. R. Co. *v.* Malone, 46 Ala. 391; Springfield & I. S. R. Co. *v.* Andrews, 68 Ill. 56; Toledo & W. W. R. Co. *v.* Furguesson, 42 Ill. 449; Great Western R. Co. *v.* Geddis, 33 Ill. 304; Chicago & R. I. R. Co. *v.* Reid, 24 Ill. 144; Turner *v.* Kansas City, St. J. & C. B. R. Co., 78 Mo. 578; s. c., 19 Am. & Eng. R. R. Cas. 506; Braxton *v.* Hannibal & St. J. R. Co., 77 Mo. 455; s. c., 13 Am. & Eng. R. R. Cas. 494; Owens. *v.* Hannibal & St. J. R. Co., 58 Mo. 386; Hewenstein *v.* Pacific R. Co., 55 Mo. 33; East Tennessee, Va. & Ga. R. Co. *v.* Scales, 2 Lea (Tenn.), 688. Particularly is this true in those cases where, if the signals had been given, they might probably have frightened the animals from the crossing. Indianapolis & St. L. R. Co. *v.* Peyton, 76 Ill. 340; Pennsylvania Co. *v.* Krick, 47 Ind. 369; Gates *v.* Burlington, C. R. & M. R. Co., 39 Iowa, 45; Lapine *v.* New Orleans, O. & Gt. W. R. Co., 20

La. An. 158; Turner *v.* Kansas City, St. J. & C. B. R. Co., 78 Mo. 578; s. c., 19 Am. & Eng. R. R. Cas. 506; Owens *v.* Hannibal & St. J. R. Co., 58 Mo. 386; Tabor *v.* Missouri Valley R. Co., 46 Mo. 354; Bemis *v.* Connecticut & P. R. R. Co., 42 Vt. 375; Washington *v.* Baltimore & O. R. Co., 17 W. Va. 190; s. c., 10 Am. & Eng. R. R. Cas. 479.

Same—A Railroad Company is Always Bound to Use Ordinary Care and Diligence as to Stock Rightfully on the Highway.—See Lane *v.* Kansas City, Fort Scott & Gulf R. Co., 31 Kan. 525; s. c., 15 Am. & Eng. R. R. Cas. 526; Kendig *v.* Chicago, R. I. & P. R. Co., 79 Mo. 20; s. c., 19 Am. & Eng. R. R. Cas. 493. But the company is not liable where the giving of the statutory signal at the proper place results in frightening animals on to the crossing, where they are injured. Manhattan A. & B. R. Co. *v.* Stewart, 30 Kan. 226; s. c., 13 Am. & Eng. R. R. Cas. 503. Although the unnecessary sounding of the bell or whistle, when not required by statute and at such time and place, though it will probably cause animals to come upon the track at the crossing, is negligence where injury is caused to an animal thereby. See Philadelphia, W. & B. R. Co. *v.* Stringer, 78 Pa. St. 219; Pennsylvania R. Co. *v.* Barnett, 59 Pa. St. 259. See also Billman *v.* Indianapolis, C. & L. R. Co., 76 Ind. 166.

Same—Carelessness of the Owner in Permitting Animals to Run at Large.—As to whether the carelessness of an owner in permitting his animals to run at large is contributory negligence proximate to their injury upon a crossing by the negligent failure of a railroad company to give statutory signals where these trains approach the crossing, see Alabama Gt. S. R. Co. *v.* McAlpine, 71 Ala. 545; s. c., 15 Am. & Eng. R. R. Cas. 544; Alabama Gt. S. R. Co. *v.* Jones, 71 Ala. 487; s. c., 15 Am. & Eng. R. R. Cas. 549 and note; Bulkley *v.* New York & N. H. R. Co., 27 Conn. 479; Isbell *v.* New York & N. H. R. Co., 27 Conn. 393; s. c., 71 Am. Dec. 78; Savannah, Fla. & W. R. Co. *v.* Geiger, 21 Fla. 669; s. c., 29 Am. & Eng. R. R. Case, 274; Cairo & St. L. R. Co. *v.* Woosley, 85 Ill. 370; Ohio & M. R. Co. *v.* Fowler, 85 Ill. 21; Toledo, P. & W. R. Co. *v.* Johnston, 74 Ill. 83; Cincinnati, H. & D. R. Co. *v.* Street, 50 Ind. 225; Jeffersonville, M. & I. R. Co. *v.* Underhill, 48 Ind. 389; Indianapolis, C. & L. R. Co. *v.* Harter, 38 Ind. 557; Indianapolis & C. R. Co. *v.* McClure, 26 Ind. 370; Pacific R. Co. *v.* Brown, 14 Kan. 469; Estes *v.* Atlantic & St. L. R. Co., 63 Me. 308; Keech *v.* Baltimore & W. R. Co., 17 Md. 33; Baltimore & O. R. Co. *v.* Lamborn, 12 Md. 257; Towne *v.* Nashua & L. R. Co., 124 Mass. 101; McDonald *v.* Pittsfield & N. A. R. Co., 115 Mass. 564; Maynard *v.* Boston & M. R. Co., 115 Mass. 458; Eames *v.* Salem & L. R. Co., 98 Mass. 561; Locke *v.* St. Paul & Pac. R. Co., 15 Minn. 351; Price *v.* New Jersey R. & T. Co., 32 N. J. L. (3 Vr.) 19; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255; s. c., 49 Am. Dec. 239, and note collecting many cases *pro con;* Pittsburgh, C. & S. L. R. Co. *v.* Howard, 40 Ohio St. 6; s. c., 11 Am. & Eng. R. R. Cas. 488; Drake *v.* Philadelphia & E. R. Co., 51 Pa. St. 240; North Pa. R. Co. *v.* Rehman, 49 Pa. St. 101; New York & E. R. Co. *v.* Skinner, 19 Pa. St. 298; Washington *v.* Baltimore & O. R. Co., 17 W. Va. 190; s. c., 10 Am. & Eng. R. R. Cas. 749; McCandless *v.* Chicago N. W. R. Co., 45 Wis. 365; Stucke *v.* Milwaukee & M. R. Co., 9 Wis. 203.

Same—Duty to Give Signal in Absence of Statute.—In the absence of a statute requiring a signal to be given, a failure to give signals which would warn animals to get off the track in time to escape being run over is not negligence or evidence of negligence. See Alabama Gt. Southern R. Co. *v.* Powers, 73 Ala. 244; s. c., 11 Am. & Eng. R. R. Cas. 477; Toledo, etc., R. Co. *v.* Furgusson, 42 Ill. 449; Illinois Cent. R. Co. *v.* Goodwin, 30 Ill. 117; Illinois Cent. R. Co. *v.* Phelps, 29 Ill. 447; Indianapolis C. & L. R. Co. *v.* Hamilton, 44 Ind. 76; Michigan S. & N. I. R. Co. *v.* Fisher,

27 Ind. 96; Gates *v.* Burlington, C. & M. R. Co., 39 Iowa, 45; Jackson *v.* Chicago & N. W. R. Co., 36 Iowa, 451; Searles *v.* Milwaukee, etc., R. Co., 35 Iowa, 490; Plaster *v.* Illinois Central R. Co., 35 Iowa, 449; Flattes *v.* Chicago, R. I. & P. R. Co., 35 Iowa, 191; Missouri Pac. R. Co. *v.* Wilson, 28 Kan. 637; s. c., 11 Am. & Eng. R. R. Cas. 447; Owens *v.* Hannibal & St. J. R. Co., 58 Mo. 386; Tabor *v.* Missouri Valley R. Co., 46 Mo. 354; Bemis *v.* Connecticut & P. R. Co., 42 Vt. 375; Washington *v.* Baltimore & O. R. Co., 17 W. Va. 190; s. c., 10 Am. & Eng. R. R. Cas. 749.

Injuries to Animals at Crossings.—See Union Pac. R. Co. *v.* Blum, and note, *ante*, pp. 119–121.

HURD

v.

GRAND TRUNK R. CO.

15 *Ont. App. Rep.* 58.)

Farm crossing—Animals going upon track at—Duty of Company.—By the negligence of the plaintiff's servants, his horses escaped upon the defendants' line of road at a farm crossing, not far from an open overhead bridge on the track. Some of them were astray upon the track. While being driven back towards the crossing by the persons in charge, a train approached, which drew up for a time, the rear cars being on the crossing; and then, the track being clear, the engine driver sounded the whistle for brakes off, and proceeded. The horses, or some of them, had then come nearly abreast of the engine, but alarmed by the whistle and motion of the train they turned and ran on towards the bridge. They got upon the bridge before they could be stopped, and some had their legs broken by getting between the ties, and others jumped over the sides and were killed or injured. There was ample space on each side of the track by which the horses might have passed. There was no evidence that the engineer had acted recklessly or wantonly in proceeding with the train. *Held*, that the defendants were not liable; there was no evidence of negligence in the manner in which the train was started; the defendants were using their own property as of right and in a lawful way, and no duty was cast upon the engineer to wait until the horses had been entirely driven off their premises.

THIS was an appeal from the judgment of the Queen's Bench Division, pronounced on the 23d of December, 1886, whereby an order *nisi* obtained by the defendants and a motion made by them to set aside the findings of the jury, and the judgment entered thereon for the plaintiff, and to enter a nonsuit or judgment for the defendants, or for a new trial, were respectively discharged and dismissed with costs.

The case was tried before O'Connor, J., and a jury, at the Hamilton Spring Assizes of 1886, when a verdict was given and judgment entered in favor of the plaintiff.

The action was for negligence on the part of the servants of the defendants, whereby several horses, the property of the plaintiff, were killed, and others seriously damaged on the defendants' railway between Hamilton and Toronto, a little to the east of the wooden overhead bridge near the Waterdown station. The locality may be described as follows: The plaintiff's farm crossing is to the north of the railway track, and is 1460 feet east from the Waterdown station overhead bridge in the direction of the railway bridge. The railway over the bridge to the east, which is over the highway, and where the accident happened, is 1196 feet to the east of the farm crossing. It is an iron girder bridge 32½ feet in length, 14 feet wide. There are wooden ties about from 8 to 10 inches apart, and the height above the highway is 12½ feet, and above the culvert on the highway about 15 feet.

The train which did the damage was going east from the direction of the Waterdown station.

One of the witnesses, Caleb Fonger, who was in the plaintiff's employ, said he had 16 heavy draught mares in charge that day; that they were in pasture on the south side of the track, and he was told to drive them by the farm crossing to the north side. Robert Bell, another witness, was assisting. Bell went ahead to open the farm gate on the other side, then he opened the south gate, at which time the horses were about 150 yards from the south gate; Bell then stood at the Waterdown or west side of the crossing, and he (Fonger) drove the horses on to the farm crossing. One of the horses then turned east in the direction of the bridge where the accident happened, and the rest followed; no train was then seen or heard; when the horses turned along the track Fonger went across the fields to head them; he did not see the train coming till he got on to the track again near the bridge: that is the bridge where the accident happened, and the train was then up by the west or wooden bridge. The train stopped about half way between the two bridges, that is the west and east bridges, not far from the farm crossing; Fonger was then driving the animals back towards the farm crossing and towards the train upon the north side of the track; and continuing, Fonger said: "When I got them up pretty near to the train, the whistle sounded, and that started them and scared them back of me; it was a pretty sharp whistle. The train then started right up, and it went on till it got within twenty or thirty feet of the bridge; the horses got on to the bridge; four of them fell over; three of them were killed; the others were all damaged pretty bad; they were stuck in the bridge, their legs got down between the sleepers, and so on. The horses were going along very good as I was driving towards the locomotive; the whistle turned them; the train might have

stood two or three minutes before blowing the whistle. I suppose there were twenty or twenty-two cars in the train; Bell was at the crossing when the whistle was blown, it was between seven and eight in the morning; if the whistle had not been sounded, the horses would have been past the locomotive in about a minute."

The appeal came on for hearing on the 9th of February, 1888.

McCarthy, Q. C., and *Wallace Nesbitt* for appellants.

Robinson, Q. C., and *Lazier* for respondent.

Wallace Nesbitt in reply.

Facts.

HAGARTY, C.J., O.—The facts of the case, stated by the learned chief justice of the Queen's Bench, very clearly show the particulars of the accident. The statement is very fair towards the defendants, and, down to the actual decision, wholly in their favor.

He shows how the horses got upon the track by the gross neglect of plaintiff's servants. They were seen by the engine-driver, and the train was, as he says, slowed down; as plaintiff's witnesses say, it was stopped. Then the plaintiff's man turned the horses back, and, as they came along towards the train and the foremost abreast or nearly abreast of the engine, but none of them being on the track (the space between the railway fences was 150 feet), the engineer thought the horses were out of danger, and seeing them on the north side of the track, and that the track was clear, whistled off brakes and went on. The horses then turned, frightened, as is said, by the train and the whistle, rushed down to the open bridge, and were killed or injured therein. The train was pulled up before coming to the bridge, and never touched the cattle.

The man who drove them back says he did not expect any accident till just before the train got to the bridge, when the horses made a rush over into the bridge.

Remarks of chief justice.

The chief justice says: "The man in charge of the horses said throughout that he did not expect an accident to happen, and so also did the engineer; and if the jury had found for the defendants, I would not have been disposed to disturb the verdict. But the jury, upon the whole case, found the defendants' officers did not act judiciously in the management of their train; and it seems almost certain that, if the engineer had delayed his train for two or three minutes longer from the time when the horses were abreast of the enigne, no accident would have happened. The train was in no peril at the time, and that short time might well have been spared to the horses. It is a hard case, for the damage has been caused by the great negligence of the plaintiff's own servants, and by something like a mere error of judgment at the most on the part

of the defendants' own engineer; but the jury have determined it, and I cannot say they have wrongfully done so."

I must say, with much respect, that in the view of the evidence thus expressed, I should have confidently expected a judgment against the verdict rendered by the jury.

I am not able to see the similitude which is urged between this case and the donkey on the high-road.

It is clear that in such cases, whether as regards man or beast, it is the duty of every one to avoid, if possible, injuring either if it can be avoided; and this duty is not excusable because the object injured is not on or using the highway in a reasonably proper manner. Because a man is driving on the wrong side of the road, or a hobbled donkey is left thereon, it is no excuse for injuring it if the injury can be reasonably avoided.

Power to avoid the accident.

We have seen it remarked that the driver on a high road or street has volition and may be able to avoid anything on the road, but the railroad driver has limited power and can only drive on the rails.

It is impossible to overlook the fact that, in such a case as that before us, the defendants were using their ordinary powers in running trains at high rates of speed on their own inclosed road, and that in the ordinary stopping or starting of the trains, or when the pressure attains a certain height, the steam is blown off, and very loud and disturbing noises are inevitably caused. There was nothing on their track with which they could come in contact—they did not run against anything.

A herd of horses had, by the wholly wrongful neglect of plaintiff, trespassed on their inclosed road; they had been turned back from the open bridge, and came down abreast of the engine. The driver, seeing his track ahead clear, pushed on his train, whistling for brakes off as he did so, and for this whistling his employers are held responsible for the horses taking fright and rushing back to the open bridge, and there damaging themselves.

I am wholly unable to believe that any case was made out to be submitted to a jury to find against the company. I see nothing whatever to support the charge of breach of duty by negligent or careless management of their train. It may be quite true that, if the whistle had not sounded, the horses might have passed the train in safety. But the engineer considered that the rear of his train was still on the farm-crossing, and that he could safely proceed. His being possibly mistaken as to this cannot, I think, in the absence of any wanton or reckless conduct on his part, create a liability. Had his opinion proved right by the result, and no damage been occasioned, all would agree there was no negli-

No liability for engineer's miscalculation.

gence. Because he had miscalculated the extent of the horses' nervousness, and damages resulted, does his conduct therefore amount to actionable negligence?

The witnesses, in the usual fashion, judge by the result, not by the intrinsic carefulness or carelessness of the act. This is one of the strongest illustrations that I remember of the *post hoc, propter hoc* doctrine.

I presume that the plaintiff would argue, the company would have been equally liable if the horses had rushed past the train and been injured at the narrow farm-crossing, or if in their fright they had hurt themselves in trying to escape by jumping the side fences; and it would not require much extension of the plaintiff's argument to make the defendants liable if the same herd of horses in the adjoining field had, in consequence of the rush or whistling of the train, injured themselves against the fences of their inclosure.

Case different from collision with horses.

The case is wholly different, as I view it, from a collision with or running down of the horses on the track. The track was open and unencumbered, there was ample space on each side of the rails, and I can see no breach of duty or actionable wrong by act of the engineer in deciding to go forward, and giving the usual signal therefor, under the circumstances in evidence.

I accept the test so often laid down, and consider that on this evidence no twelve reasonable men could properly find a verdict for the plaintiff.

As has been said, "It would place in the hands of jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever." 3 App. Cas. 197.

Authorities reviewed.

In Fullarton *v.* Manchester South Junction, etc., R. W. Co., 14 C. B. N. S. 54, the plaintiff's carriage was waiting, with others, to pass the railway track at a level-crossing while the gates were shut. The engineer, at starting, whistled and blew off the mud-cocks, or taps, in front of the engine, throwing out a large volume of steam, which extended through the gates towards plaintiff's horses. They took fright, and they and the carriage were much damaged against a wall. There was evidence that it was quite unnecessary and unusual to relieve the cylinder by blowing off from the mud-cocks at this level-crossing. Erle, C.J., on appeal, held the company had been rightly held liable; that plaintiff's horses were using the high road as of right; and the defendants had exercised their right of crossing the highway in an inconvenient and improper manner.

In this Court in Rosenberger *v.* Grand Trunk R. W. Co., 8 A. R. 482, s. c. 15 Am. & Eng. R. R. Cas. 448, it was held, that

plaintiff could recover for damages done to the carriage, the horses taking fright at a passing train, the defendants having omitted to ring or whistle on approaching a crossing, which would, if given, have warned the plaintiff not to approach too near. The judgment was based on the breach of duty imposed by statute for the protection of the public.

These are the only cases referred to as damage, not by collision, but from animals taking fright as here.

In Degg *v.* Midland R. W. Co., 1 H & N. at 781, Bramwell, B., delivering the judgment of the Court remarks:

"The law, for reasons of supposed convenience, more than on principle, makes a master liable in certain cases for the acts of his servants, not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets, where damage is thereby done. This is a responsibility the law has put on them, there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrongdoer have power to create such a responsibility and such a duty? No reason can be assigned. Some acts are absolutely and intrinsically wrong, such as a blow, others only so from their probable consequences. There is no absolute or intrinsic negligence; it is always relative to some circumstance of time, place, or person. . . . It seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty."

In that case, the injury was caused to deceased by his volunteering to help defendants' servants to move a truck at their station, which truck was struck by another truck by the negligent running of one of the defendants' engines.

In Singleton *v.* Eastern C. R. W. Co., 7 C. B. N. S. 287, two children, three and half and five and a half years old, by some means got on the defendants' track, and were sitting on the parapet of a small wooden bridge on the railway when a train came up, and in passing cut off one of the children's legs. "It appeared the train was coming up an incline and the driver saw the dangerous position of the children, but made no attempt to stop the engine, contenting himself with merely turning on his whistle."

There was no evidence to show how the children got there, it was supposed they had got through the fence at a place where a rail was off. There was a nonsuit by Erle, C. J., with leave to move, and in term counsel urged that there was negligence on the driver's part in not stopping when he might have

done so, and also as to the fence. Erle, C. J., said the plaintiff was wrongfully upon the railway; ". . . I must confess I was wholly unable to discover any evidence of negligence on the part of the servants of the company." Williams, J. said: "I also think there was no negligence made out on the part of the railway. All was mere conjecture and surmise." Rule refused.

This case certainly goes further than I supposed. It is cited in the text books. The only comment I have seen is in Pollock on Torts, at p. 383, in a note, "It was decided on the ground (whether rightly taken or not) that there was no evidence of negligence at all." It is cited without comment in Williams *v.* Great Western R. W. Co., L. R. 9 Ex. 159, a case of somewhat similar character.

In Auger *v.* Ontario, Simcoe, and Huron R. W. Co., 9 U. Can. C. P. 165, the track was unfenced. Horses were on the track. Two of them running ahead of the train were caught in a culvert and killed by the engine. There was the usual contradictory evidence as to what could have been done and ought to have been done. Steam was shut off, speed slackened, and whistle blown. On whistling the horses ran off the track, speed was then increased, they ran on again and two were caught in a culvert. The engineer again called for breaks, it was a down grade and the train could not be stopped till the horses were killed. It was objected that the horses were unlawfully on the track, and that the defendants were not liable even if there was unskilfulness and negligence. Draper, C. J., reserved leave to move. It was left to the jury to find if the horses were killed by negligence or unskilfulness in managing the engine. The jury found for plaintiff.

After argument in term Richards, C. J., delivered the judgment of the court making the rule absolute for a nonsuit: "If it be admitted that under the decided cases the horses were not lawfully on the railway, without declaring that that circumstance would authorize a verdict for the defendants in all cases, I do not think we would be justified in holding that the facts proved at the trial, taken in their broadest sense against the defendants, show that they were guilty of negligence in relation to those horses which were wrongfully on their railway."

Reference was made to Ricketts *v.* East and West India Dock Co., 12 C. B. 174, where Jervis, C. J., says:

"The next question is, in what respect does the statute vary the ordinary common law liability? It seems to me that so far from varying the responsibility of the defendants, the statute has most properly taken the common law rule as the measure of their liability"; this was said in reference to fencing against adjoining lands.

The Chief Justice also said, that it was not law to insist that

the dangerous nature of the trade cast on defendants an obligation to adopt more than ordinary precaution. Cresswell, J., says that Rex. *v.* Pease, 4 B & Ad. 30, was a strong authority to show that the Legislature having legalized railways, they are not subject to any liabilities beyond the ordinary common law liability except where the Legislature has thought fit to impose it.

In Sharrod *v.* London and North Western R. W. Co., 4 Ex. 580, sheep had got on the line; the driver had instructions to drive at a certain rate per hour. It was supposed that while going at that rate in the dusk of evening the driver could not have seen the sheep in sufficient time to avoid collision. Leave was reserved. Other points were involved. In giving judgment, Parke B., said:

"If the cattle were altogether wrongdoers, there has been no neglect or misconduct for which defendants were responsible."

Mr. Robinson relied on the case of Campbell *v.* Great Western R. W. Co., 15 U. C. R. 498 (1857). The facts there were much stronger against the company. The horses were seen by the driver on the track, the train had just stopped to drive some cows off the road and "as they were moving off again they saw plaintiff's colts on the track in front about 250 yards off; the whistle was sounded, the colts ran on before the train till they got to a concession line, where a cattle guard stopped them. No signal was given to apply brakes, and from the time the train was started the speed continued to increase notwithstanding the colts were just before them, and notwithstanding the uncertainty whether they would get out of the road or not." They were killed. The verdict was upheld. Mr. Justice Burns said, that, "the evidence tends to establish a desire rather to run them down than to avoid them, and this I think they were not at liberty to do."

I am unable fully to agree with some of the remarks made by the same learned Judge, especially as to the defendants' duty because they exercised a dangerous calling.

Bowen, L. J., says: in Thomas *v.* Quartermaine, 18 Q. B. Div. 697, "Contributory negligence arises where there has been a breach of duty on defendants' part, not where ex hypothesi, there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the casual connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury."

I also refer to Tolhausen *v.* Davies, 4 Times Reports, p. 328, discussed in Law Times, February 25, 1888.

It appears to me that we are to deal with the defendants'

position and duties as to the trespassers on their own ground, on the same principles that govern the duties and liabilities of a man riding, driving, or shooting in his own park or close; and I invite attention to the whole judgment on this of Lord Bramwell in Degg *v.* Midland R. Co., from which I have made a partial extract.

The general principle as to liability where—notwithstanding the negligence of plaintiff—the mischief is caused by the neglect of the defendants to exercise ordinary care in avoiding the danger, is clearly laid down in the House of Lords in Radley *v.* London & Northwestern R. Co., 1 App. Cas. 754, and must of course govern.

Heaven v. Pender quoted.

BURTON, J.A.—I cannot commence the statement of my views as to the liability of the defendants in this case better than by quoting the following remarks of the master of the rolls, in Heaven *v.* Pender, 11 Q. B. D. 503–507:

"But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensues from such want, unless the person charged with such want of ordinary care had a duty, to the person complaining, to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

Whether complaint would have been demurrable if all facts were stated.

If the facts of which we are now in possession had been stated in the plaintiff's statement of complaint, would that statement have been demurrable as shewing no cause of action?

It would then have been stated that the horses in question had got upon the track through no default of the defendants or their servants, but admittedly through the negligence of the plaintiff; a negligence for which the plaintiff would have been liable in the event of the train having been derailed and the servants or property of the company injured by reason of its having come into collision with the horses.

They were wrongfully, therefore, on the defendants' premises.

The mere statement of a duty, if it does not arise upon the facts alleged, cannot aid the plaintiff; and when he states it was the duty of the defendants' servant, when he saw the horses on the company's premises, to stop the train, as stated in the 4th paragraph, he states something as a duty which does not arise upon the facts.

The 5th paragraph, if stated in accordance with the facts as we now know them, must necessarily have omitted the averment

that the horses were being driven lawfully and properly by the plaintiff's servants; they were then unlawfully, not upon the crossing, but upon another portion of the track. And being so there, what is the allegation of duty, and the breach of it, which is alleged—"that before they had come up to, and when they were within a few yards of, the said locomotive and freight train, the said servants of the defendants negligently and carelessly, and without exercising due and proper care, again sounded the said locomotive whistle with great noise and shrillness, and started towards its destination, and in the direction from which the said horses and mares were then being driven by the plaintiff's said servants, and proceeded on its way"?

It is then alleged that, by reason of the omission to stop the train, and in sounding the whistle at the time and in the manner in which it was sounded, the horses became frightened and uncontrollable, and ran back along the track and over a bridge, and were killed or otherwise greatly injured.

If the plaintiff's claim had been thus stated, I think, with great submission, that it would have been bad upon demurrer, on the ground that there was no such duty as alleged due by the defendants to the plaintiff.

I do not think that this at all conflicts with Campbell *v.* Great Western R. Co., 15 U. C. R. 505. Here the particular breach of duty complained of is alleged, and we cannot avoid seeing that no such duty under the circumstances exists. If it had been alleged that, although the defendants knew the danger, and either recklessly ran over the horses or drove them recklessly or intentionally to a place of danger, where injury was almost inevitable, the statement would have disclosed a cause of action. The evidence, to make the defendants liable, should be equally cogent, and I think there was no evidence from which such recklessness or intentional wrongdoing could be reasonably inferred. **Authorities.**

Campbell's case was decided in 1858, and, as I understand it, the learned judge held that there was evidence from which the jury might or might not find recklessness or intentional wrongdoing on the part of the defendants' servants.

Auger *v.* Ontario, Simdol & Huron R. Co., 9 C. P. 165, was decided two years later; and the law on the subject is more fully discussed, and the discision is much more in accordance with the view I am now expressing.

Sharrod *v.* London & Northwestern R. Co., 4 Ex. 580, is referred to in that case; and I quote from it the following remarks from Parke, baron, in giving judgment:

"If in the present case the plaintiff's cattle had a right to be on the railway, the plaintiff has a remedy by action on the case against the company for driving the engine in such a way as to

injure that right; for the defendants were bound to see that their carriages did not travel at such speed as to make it impossible to avoid other persons who had a lawful right to be there. If the cattle were altogether wrongdoers, there has been no neglect or misconduct for which the defendants are responsible."

The question of negligence is ordinarily a question of fact; and therefore ought to be submitted, under proper instructions, to the jury. When the measure of duty is ordinary and remarkable care, and the degree varies according to circumstances, the question cannot, from the very nature of the case, be for the court, but must be submitted to a jury.

Question for the court.

But where the precise duty is alleged and the material facts are undisputed—as, for instance in this case, that the horses were improperly on the defendants' road,—and the breach of duty relied on is the fact that the engine-driver did not stop his train at once on seeing the horses, and that he whistled at a particular time, although such whistling is shewn to be the usual signal for putting on or taking off brakes, the question, I apprehend, is for the court. Did the defendants owe any such duty to the plaintiff?

Duty owing by defendant.

If it were shown that a passenger voluntarily left his seat in a railway carriage, and chose for his own convenience to stand upon the platform, and then by a sudden jolt of the cars was thrown off and injured, that would, I should say, be *per se* negligence disentitling him to recover, and there would be no question for the jury.

One not unnaturally sympathizes with the plaintiffs in the heavy loss they have sustained; and it is not improbable that, if we are driven to the conclusion that there is any evidence which ought properly to be submitted to a jury they will succeed in obtaining a verdict against the railway company as often as the case is tried. But we shall be assuming a very grave and serious responsibility, and shall be imposing upon railway companies a very unreasonable addition to their ordinary risks and liabilities, if we hold that in this case there was any evidence, to go to the jury, of want of ordinary care and diligence on the part of the company.

The first and paramount duty of the company is to their passengers. They regulate the general speed of their trains on the assumption that they will find the track free from obstructions. If they are to bring their train to a standstill every time they meet with cattle trespassing on the track, they would, in effect, be subjecting the management of their road and the persons and property in their charge to the control of wrongdoers, and holding out a premium to them for wrongdoing, and greatly increasing the chances of collision.

The ordinary means employed to drive cattle from the track is

that which is complained of here,—the use of the whistle,—and that is generally sufficient.

There is no evidence that the engine-driver was not competent; and much must necessarily be left to his discretion, having in view the necessity of avoiding other trains which may be running about the same time.

No doubt the company ought to be held responsible for the employment of competent men, and should be responsible that they act in good faith and with common prudence; and they should be held to the exercise of such care and diligence, having due regard to the paramount obligation to which I have referred, —to avoid unnecessary injury to property even though it is improperly on their track.

The mere fact that the train was not brought to a standstill does not in itself show any want of ordinary care; and the act of whistling, which was necessary as a signal to the brakeman, ought not, in my opinion, to be regarded as evidence from which a jury might reasonably infer a want of reasonable care under the circumstances of this case, even though the engine-driver may have erred in judgment in whistling at that particular moment.

I think we should be laying down a very dangerous rule were we to hold that a wrongdoer could maintain an action against a railway company on such evidence as was given in this case; and I therefore am of opinion that the appeal should be allowed, and the action dismissed, with costs.

PATTERSON, J.A. concurred.

OSLER, J.A.,—I think the evidence fails to show thatthe defendants' driver was guilty of any breach of duty in blowing the whistle and starting his train when he did. The line was clear, and unless (which is absurd) the driver was bound to wait until the horses had been driven off the defendants' premises, so as to avoid altogether the risk of frightening them, I cannot see that he was guilty of negligence,—that is to say, of a breach of any duty he owed to the plaintiff,—in proceeding on his journey. There is not the least suggestion that the whistle was blown for any reason other than that it was a usual and necessary act in starting the train.

No negligence in blowing whistle.

I have had an opportunity of reading the judgment of the learned chief justice, and concur generally in his reasons for allowing the appeal.

Appeal allowed, with costs; and action dismissed, with costs.

Frightening Horses.—See, *ante*, Cleveland, C. C. & I. R. Co. *v.* Wyant, 328, and note, 333.

PEOPLE *ex rel.* HUNT

v.

CHICAGO AND ALTON R. CO.

(*Illinois Supreme Court, June* 16, 1888.)

Railroads—Depots—Obligation to Construct.—In the absence of charter of statutory provisions regulating, railroads cannot be required to construct and maintain depot buildings at those points on the line where it is in the habit of receiving and discharging passengers and freight.

Same—Statutory Regulation—Construction.—Under the Illinois act (Sess. Laws, 1877, p. 155, sec. 1) which provides that all railroad companies in the State carrying passengers or freight shall "build and maintain depots for the comfort of passengers, and for the protection of shippers of freight where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages on the line of their road having a population of 500 or more." A railroad cannot be required to construct and maintain depots—that is, buildings—at a particular point, unless it is made clearly to appear that such place contains a population of over five hundred, and is also a point on its line of road where the respondent is "in the practice of receiving and delivering passengers and freight."

APPEAL from a judgment against plaintiff on a petition by the attorney-general for a mandate against defendant requiring it to establish a passenger and freight depot in the town of Upper Alton.

The facts are stated in the opinion

Geo. Hunt, atty.-gen., for appellant.

Wise & Davis for appellee.

SCOTT, J.—The petition in this case was exhibited by the attorney-general in the circuit court of Madison county, in the name and on behalf of the People, against the Chicago & Alton R. Co., praying that the company be compelled by a writ of mandamus to establish a passenger and freight depot in the town of Upper Alton, upon the St. Louis, Jacksonville & Chicago Railroad, owned, operated, and controlled by respondent, at a suitable and convenient point to accommodate the public and all persons desiring transportation for freights or passengers to and from such town, and to stop its trains, freight and passenger, or a sufficient number thereof to accommodate the public, and discharge freight and passengers thereat, when so requested. Undoubtedly railroad companies, unless controlled by charter contracts or by some general law on the subject, are permitted much freedom of

Facts.

judgment or discretion as to the operation and equipment of their lines of road and in the location and maintenance of depot, and in the adoption of the various conveniences for the public. That freedom to act for the best interests of the public in such matters is lodged in the president and board of directors. Where there is a failure, from mere captiousness or other cause, to so exercise the powers with which they are invested by law as to accommodate the public at business centres, or elsewhere, or where there is such an abuse of their powers as works a public wrong, the general rule is that the remedy must be obtained through legislation. The courts—either law or equity—are seldom, if ever, able to afford the requisite relief. In respect to the matter of locating depots this court said in Marsh *v.* Fairbury, P. & N. W. R. Co., 64 Ill. 414: "Railroad companies, in order to fulfill one of the ends of their creation,—the promotion of the general welfare,—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require." More recently, in the case of Ohio & M. R. Co. *v.* People, 120 Ill. 200; s. c., 30 Am. & Eng. R. R. Cas. 427, the general doctrine on this subject was restated, where it was said: "The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road. Hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted." On turning to its original charter, it is seen the respondent corporation is declared to have the general management of its affairs for the complete exercise of its corporate powers, which of course include the right to fix the location and number of depots or stations at which it will receive and discharge freight and passengers on its line of road, such as in the judgment of the company the public exigency demands. The only act of the General Assembly to which the attention of this court has been directed that seems intended to control this freedom of action or discretion given to railroad companies in such matters is the Act of 1877. But that act, it will be seen, does not aid the demand made by this petition. It provides (Sess. Laws 1877, p. 165, § 1) "that all railroad companies in this State carrying passengers or freight shall, and they are hereby required to, build and maintain depots for the comfort of passengers and for the protection of shippers of freight, where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages on the line of their road having a population of 500 or more." As

Freedom of company in operation of road.

Duty of company as to erection of depots.

has been seen, the prayer of the petition is that respondent may be compelled "to establish a passenger and freight depot in the town of Upper Alton," on the Jacksonville branch of its road, "at a suitable and convenient point to accommodate the public," and "to stop its trains, freight and passenger, or a sufficient number thereof to accommodate the public." Should the company be required to establish or appoint a station at Upper Alton for the purpose of receiving and discharging passengers and freight, it would follow as a matter of course, under the statute, that it would be compelled "to build and maintain" a depot at that point if the town contained a "population of 500 or more." But this statute does not make it the duty of respondent to "establish a depot or station at every town or village on the line of its road having a population of 500 or more." It simply requires it shall "build and maintain depots"—that is buildings—for the "comfort of passengers and for the protection of shippers of freight." This petition does allege the town of Upper Alton contains a population in excess of that specified in the statute; but it is not averred it is a point on its line of road where respondent is "in the practice of receiving and delivering passengers and freight." So the demand made by this petition does not come within any duty imposed upon respondent by the provisions of this statute, nor does it appear that it is made its duty by its original charter, or otherwise by law, to "establish a passenger and freight" depot at the point indicated, and to stop its trains, passenger and freight, for the accommodation of the public. It not being shown that respondent owes any specific duty in this repect, imposed by statute or otherwise, the right to its performance being so clear and undoubted that it will be enforced by mandamus,—the judgment of the lower court, denying the writ, must be affirmed.

Railroad Depots—Power to Compel Erection.—In the case of People *v.* N. Y., L. E. & W. R. Co., 104 N. Y. 58; s.c., 29 Am. & Eng. R. R. Cas. 480, and note 485; 58 Am. Rep. 484, it was held, by the New York court of appeals, that at common law a carrier of passengers and freight is under no obligation to provide depots for passengers awaiting transportation or warehouses. The court say that the court cannot compel the erection of a station-house, nor the enlargement of one. "The power of the company to provide such buildings is, under the statute, a permissive one only. If the corporation choose to exercise it, it may. The statute does not exact it. . . . The statute is peremptory as to many matters; but it nowhere says that, for its intending passengers or awaiting freights, cover by building of any kind shall be provided. As to that the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion, the legislature only can interfere. . . . The

grievance complained of is an obvious one; but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by any fair or reasonable construction be implied."

A contrary doctrine is held in some cases. Thus, it is held, by the supreme court of Nebraska, in the case of State *ex rel.* Mattoon *v.* Republican Valley R. Co., 17 Neb. 647; s. c., 22 Am. & Eng. R. R. Cas. 500, that "The common law, under the principle that it is the duty of the railroad company to furnish reasonably sufficient and equal facilities to the public, whose servant it is, authorizes courts, by *mandamus*, to compel the erection and maintenance of new stations in proper cases." The court say: "At common law it was the duty of a common carrier by land to deliver freight personally to the consignee; but when railways took the place of conveyances drawn by animals, necessity required the relaxation of this rule so as to allow of the substitution, in place of personal delivery, of a delivery at the warehouse or depot provided by the cmopanies for the storage of goods. Vincent *v.* Chicago & A. R. Co., 49 Ill. 33. Is it too much to say that this relaxation of the above rule in favor of railway companies as common carriers, imposed upon them the duty of providing suitable depots for the purpose of such delivery? This duty is so intimately connected with the business for which railways are built and managed, that motives of self-interest almost always secure its observance. But when, for any reason, it is neglected or refused, may it not be enforced, the same as any other public duty?" And it was held, in the case of Northern Pac. R. Co. *v.* Territory (Wash. Tr.), 29 Am. & Eng. R. R. Cas. 82, that "The court of equity will compel a railway company to construct a depot and give other railroad facilities at a proper and necessary place. As the time to establish a station upon a public highway is a public duty, no demand for the placing of a station need be made by the state before bringing suit to enforce the duty." In the course of the opinion, the court say: "In the absence of legislation providing other means for regulating and controlling the matter. Field on Corp. 585; Moses on Mand. 155–169. See also note to People *v.* New York, L. E. & W. R. Co., 29 Am. & Eng. R. R. Cas. 485.

Same — Regulation by Statute — Constitutional Law. — In the case of Commonwealth *v.* Eastern R. Co., 103 Mass. 254; s. c., 4 Am. Rep. 555, it was held that a statute requiring a railroad corporation, whose charter is subject to amendment, illustration, or repeal at the pleasure of the legislature, to establish a flag station at a certain point on its line, and to erect there a station-house at which at least two trains each way shall stop each day, is not a violation of the Constitution of the United States as impairing the obligation of contracts. See also Fitchburg R. Co. *v.* Grand Junction R. Co., 86 Mass. (4 Allen) 198; State *v.* New Haven & N. R. Co., 43 Conn. 351; s. c., 44 Conn. 376.

ALABAMA GREAT SOUTHERN R. CO.

v.

ARNOLD.

(*Alabama Supreme Court, May* 30, 1888.)

Railroad Companies—Station—Duty to Light.—Where a railroad company has erected a station-house, consisting of a ticket-office, waiting-room, and platform for the accommodation of and transaction of business with the public, it is the duty of the company to see that the same are adapted for the purpose for which they are erected, and safe; and should cause the same to be lighted a proper time before the arrival and after the departure of trains. Distinguishing, People *v.* New York, L. E. & W. R. Co. 104 N. Y. 58; s. c., 29 Am. & Eng. R. R. Cas. 480; 58 Am. Rep. 484.

Same—Negligence—Injury—Exemplary Damages.—To entitle the plaintiff to exemplary or punitive damages they must be claimed in the complaint; and the negligence causing the injury must have been wilful, wanton or reckless.

Same—Failure to Light Depot Grounds.—The simple neglect to sufficiently light depot grounds, is not such wilful, wanton, or reckless negligence on the part of the railroad company as to entitle a party injured to exemplary or punitive damages.

Same—Appliances Used—Duty of Company.—If a railroad corporation in the administration of their affairs, conform to the rules adopted or in general use by prudently conducted railroads, they are free from blame unless they violate or disregard some positive requirement of the law and thereby inflict an injury.

Same—Dangerous Place—Injury—Contributory Negligence.—Where the testimony only shows that the plaintiff after leaving the ticket-office and while crossing the platform was cautioned to "Look out for the steps," and that by crossing the platform obliquely he missed the steps and thereby sustained injuries, the question of proximate contributory negligence is for the jury. Strong, C. J., dissenting.

APPEAL from Circuit Court, Greene County.

This was an action by John W. Arnold against the appellant, the Alabama Great Southern R. Co., for personal injuries received in falling at night from the platform of the railroad station of said company at Boligee, which fall he alleged was due to the failure on the part of the railroad company to have the station or depot properly lighted. Arnold had gone to the ticket-office, purchased a ticket for transportation on the train then about to arrive, and, on leaving the office, fell from the platform, and received the injury here complained of in this suit. Defendant demurred to the complaint on the ground that it was not the legal duty of defendant to provide good and safe platform and lights, or either such platform or lights, at Boligee

station. This demurrer being overruled, the defendant then filed the following pleas: "(1) That it is not guilty of the matter alleged in said complaint." Second and fourth pleas set up contributory negligence on the part of plaintiff. "(3) And, for a further plea to said complaint, defendant avers that all the injuries to the plaintiff therein complained of were the result of accident." "(5) And, for further plea to said complaint, the defendant avers that, at the time of the said injury, . . . there was no statute or law of force in Alabama imposing upon defendant the duty, nor any duty resting upon defendant as carrier of passengers, of furnishing any better platform or light or lights, at said station of Boligee, than was furnished at said station at the time of the alleged injury. (6) For further plea . . . defendant . . . says that . . . said Boligee station, at which said injury occurred, is situated upon the said railroad between the capitals of the counties of Greene and Sumter; that the population of the village at and about said station is small, being, to wit, one hundred persons, and the business transacted at said station is small in proportion; that the village at said station of Boligee is not an incorporated town, and has no municipal organization; that there is in said village but few streets, upon which all the business coming thereto is conducted, and which lead up to said station and said station-house, and there are no difficulties therein, but which are free and open to the public, and that said village and station of Boligee is what is commonly called a country-station; that said station of Boligee is not nor was lit by gas, electricity, or lamps or lights of any other kind upon the streets thereof, and that the only lights used in said station and village are used in the dwellings and other houses thereof, and are oil-lamps and candles; that, at the time of the alleged injury, said station-house had lamps burning therein, and were either portable or stationary, as the occasion demanded; that the said station-house was amply large for the business transacted at said point, and constructed with as much care as is usual, or required by law or statutes of the State, of such station, or custom or usage upon well-regulated railroads required; and, on account of the smallness of the village at such station in population and business, the defendant was not, by custom or law, required to have the same lighted by both indoor and outdoor light, provided they had indoor lights, which were convenient to the small travelling public, and ready to be used, and subject to their call at any time. And defendant avers that the said plaintiff and the public generally were well acquainted with said station-house, and the approaches thereto, and the habits and customs connected therewith for the regulation and use of said station, and for the use of the lights at and about the same. And the defendant avers that, this being its full duty in

the premises, they provided such lights as were required by them at the station; and neither did the plaintiff, nor any one for him, demand any further or additional lights, nor ask to be lighted to or from the stopping-place of said trains on said night. And defendant avers that it has done and performed each and every duty required of it by custom or law, and that said injury was not caused by any act, or omission to act, on its part." Plea No. 3, mentioned in the opinion as the plea to which a demurrer was sustained at a former term, set up the statute of limitations of one year to an amended count of the complaint. The amended count contained no new cause of action, and for this reason a demurrer was sustained to the plea. The distance from the ticket-office door to the steps fronting the door was shown to be three feet seven inches; this distance being the width of the platform, which was sixteen feet long. The court refused each of the following charges requested by the defendant: "(1) If the jury believe all the evidence, they must find for the defendant under the first count of the complaint. (2) If the jury believe all the evidence, they must find for the defendant under the second count of the complaint. (3) If the jury believe all the evidence, the jury are not authorized to give the plaintiff exemplary damages. (4) If the jury believe all the evidence, they are not authorized to find that the injury to the plaintiff was wanton or intentional, or to assess exemplary damages against the defendant . . . At the time of the fall of Arnold, for which damages are claimed in this suit, there was no law of the State by which a railroad company was required to light its stations or depot buildings at night, if the depot building was of such character as was of customary use by well-regulated railways at stations of like kind and business." There were many assignments of error; but the facts, above set forth, are sufficient to show all the points decided by the court.

Sam'l F. Rice, *Wood & Wood*, and *Thos. R. Roulhac* for appellant.

Jas. B. Head and *J. J. Altman* for appellee.

STONE, C. J.—This case was before us at a former term. 80 Ala, 600; s. c. 30 Am. & Eng. R. R. Cas. 546. The complaint consisted of two counts: one the original, and the other an amendment, adding a second count. The complaint is the same now as on the former appeal. On that appeal we held that the *gravamen* of each count was the same,—the failure to have the depot supplied with a light. The first or original count predicates negligence on the part of the railroad, on the naked averments that Boligee was one of its stations for receiving and discharging passengers; that at that station the railroad had erected a platform and thereon its only

Facts—Pleading.

ticket-office at that place; that plaintiff, desiring to take passage on its train, soon to arrive, had entered the office, and procured a ticket; that it was night-time, very dark, and no light furnished; that the train "was about arriving;" and that the "plaintiff attempted to descend the steps of said platform for the purpose of entering the car, and, in attempting so to do, fell, and thereby received severe personal injuries." The count then avers that "said fall and injuries were caused by the negligence of defendant or its servants, in failing to provide a light at said station, whereby plaintiff would have been able to see his way, and avoid said fall and injuries." The amendment or second count differs from the first only in the following additional averments, giving a more minute description of the place where the injury was suffered: "That said office had in front of and attached to it, fronting its entrance, a platform about three and one-half feet wide, which was accessible by steps, about three and a half feet in width, reaching from the ground to the top of the platform in front of the door of said ticket-office, over which steps and platform passengers were required to pass in entering the ticket-office. The surface of said platform was elevated about four or four and a half feet above the ground; and plaintiff avers that the construction of said steps and platform, as above described, rendered the same unsafe and dangerous, and liable to cause personal injuries to persons passing over the same." The count then described the injury as it was described in the first count, and complains of the absence of a light as the negligence which caused the injury. Speaking of these counts, we, on the former appeal, said: "The injury and the negligence complained of as the cause are the same as set forth in both counts; and, while it is averred that the construction of the steps and platform rendered them unsafe and dangerous, this does not constitute the negligence alleged to be the cause of the injury, but, as we interpret the count, the allegations are intended to show a greater and more imperative duty to provide a light, from the failure to do which it is distinctly and expressly averred, in the new count, the injuries resulted. Under neither count is the plaintiff entitled to recover for any negligence other than the failure to provide a light." When this case was returned to the circuit court, the defendant demurred to the counts of the complaint collectively, and assigned as cause of demurrer that "there was, at the time mentioned in said complaint, no statute of force in the State of Alabama which required of or imposed upon said defendant the duty to furnish good and safe platform and lights, or either such platform or lights, at Boligee station; nor was there any duty at the common law to furnish said platform or lights. There was, when the injury is alleged to have occurred, February 11, 1885, no statute relating to the subject in Ala-

bama. Our first statute on that subject was approved February 28, 1887. Sess. Acts, 74. Was there a common-law duty resting on defendant at that time?

Dangerous premises—Duty to light station.

In Railway Co. *v.* Thompson, 77 Ala. 448, we said it was "the duty" of railroads "to provide safe waiting-rooms, and to keep the depot and platform well lighted in the night-time." The injury we were considering in that case occurred at the Union depot in this city, Montgomery,—the common passenger depot of five railroads, with trains arriving and departing at different times; and the plaintiff in that suit had just alighted from the train on which he arrived. In support of our views, we referred to the following authorities which bear on the question of lighting the depot and its platform: Thompson on Negligence (volume 1, p. 315) has this language: "It is the duty of the railway company to have its station-houses open and lighted, and its servants present, for the convenience of those who may wish to leave its trains, or to depart by the same." In support of this doctrine, the author refers to Patten *v.* Railway Co., 32 Wis. 524. In that case the injury suffered was at a country depot, and the plaintiff, an elderly lady and unattended, was discharged from the train at 9.45 at night. The trial judge submitted it to the jury to determine whether the railroad was guilty of negligence in not having its depot lighted, or a person there to give information. The supreme court held there was no error in this. It will be observed that in the Wisconsin case there was at the depot neither a light, nor a person to give information. The case of Knight *v.* Railroad Co., 56 Me. 234, also referred to by Thompson, arose as follows: Plaintiff was travelling under a ticket which secured her passage over two connecting railroads and a connecting steam-boat line. From the terminus of the railroad, where plaintiff had to leave the cars, to the steam-boat, was a "considerable distance," which she had to walk. It was across a wharf, the property of defendant, provided and used for the purpose. Plaintiff, it being at night and dark, stepped into a hole in the planking, and was injured. The court said: "The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe." Another case referred to in Railway Co. *v.* Thompson is Stewart *v.* Railroad Co., 2 Am. & Eng. R. R. Cas. 497, 53 Tex. 289. The *gravamen* of the petition (plaintiff's complaint) was the negligent failure of the railroad company to provide "proper lights and accommodations for passengers at its depot." Held that, on general demurrer, the petition was sufficient. See also Peniston *v.* Railroad Co., 34 La. Ann. 777; Reynolds *v.* Railroad Co., 37 La. Ann. 694. The other cases cited do not refer to the question of lights.

The case of People *v.* New York, L. E. & W. R. Co., 104 N. Y. 58; s. c., 29 Am. & Eng. R. R. Cas. 480, is relied on as showing there is no common-law duty resting on the railroad in the matter we have in hand. That was an application for the extraordinary writ of *mandamus* to compel the railroad company to erect larger and more comfortable depot accommodations at Hamburgh, one of its stopping places. The relief was denied; the court holding that there was neither statutory nor common-law obligations resting on railroads to erect depot buildings. So, in this case, if the defendant railroad company had neglected or refused to erect any depot building, any waiting-room, or any platform at Boligee, we are not prepared to say there was any law under which it could have been compelled to do so. The foregoing is not this case. The defendant did not neglect or refuse to errect a ticket office, used as a waiting-room, with platform in front, and steps leading to it. All these were erected, and persons wishing to be carried on the railroad, or having other business with it, had a standing invitation to enter the office, and transact business thereat. Those desiring tickets must obtain them there, and not elsewhere. And this invited right of entry cannot, at least without special warning, be restricted to the simple privilege of entering and remaining long enough to procure a ticket. It would include the right, authorized by custom, of using the office as a waiting-room, if none other was provided. Hence, although there may have been no law requiring the railroad to erect an office and platform at Boligee, yet, having done so, and having thereby invited persons having business with it to enter for its transaction, the law required that they should be adapted for the purpose, and not dangerous, hazardous, or unsafe. This, under the enduring principles of the common law, which govern new exigencies that have arisen or may arise, equally with conditions that gave them form and expression centuries ago. Railway Co. *v.* Railway Co., 87 E. C. L. 409. The expression in Thompson's Case, *supra*, was used in reference to the case we were then considering. Thompson had just arrived, and left the train at a common depot of five railroads, and in a city. The train having just arrived, and passengers in the act of leaving it, and this in the night-time, it is manifest that a light should have been furnished; and, if the place was not otherwise sufficiently lighted, a light should have been provided at the place of debarkation. But this duty would have a limit. It would be incumbent only at the departure and arrival of trains, and for a sufficient time before departure to enable persons desiring to take passage to be in readiness and enter the cars without undue haste, and after the arrival to enable those leaving the train to do so in safety. Beyond this, the duty of the railroad to maintain a

Cas. 673; Rine *v.* Railroad Co., 88 Mo. 392; s. c., 25 Am. & Eng. R. R. Cas. 545. This last case expressly recognizes the correctness of the rule announced in the cases of Kelley *v.* Railroad Co., *supra*, and Frick *v.* Railroad Co., *supra*. As said by the court of appeals: "The above rule is humane, conservative of human life, and consonant with public policy. It is based upon the recognition of the fact that human beings may be and frequently are lawfully upon railway tracks, not only on highway crossings, but at other places; that in such situations they may remain unmindful of an approaching train, and thus lose their lives, or sustain great bodily injury, if those in charge of the train do not give some warning of its approach. It also proceeds upon a recognition of the fact that a railway train or locomotive is an instrument of danger to those who may happen to be on the track when its wheels are in motion; that those in charge of this instrument of danger ought, not only for the safety of persons who may happen to be on the track, but also for the safety of persons who may be on the train, to keep a constant lookout in front of the train when in motion; that this is a constant and continuing duty of an imperative character, especially when it is imposed, as in this case it is, by an ordinance of the city; and that, if a discharge of this duty would have prevented the injury to a person negligently on the track, the company is liable in damages for hurting such person, notwithstanding his negligence."

City ordinance —Evidence.

The court properly admitted in evidence an ordinance of the city of St. Louis to the effect that the speed of railroads in the city should be limited to six miles an hour; that the bell of the locomotive should be rung continuously while moving a train; and that, in backing a train, a man should be stationed on the car furthest from the locomotive to give danger signals. Merz *v.* Railroad Co., 13 Mo. App. 589; s. c., 88 Mo. 672; 26 Am. & Eng. R. R. Cas. 537, and 14 Mo. App. 459.

We see nothing in the record justifying an interference with the judgment, and it is hereby affirmed.

All concur.

Liability for Injuries Notwithstanding Contributory Negligence.—See Hays *v.* Gainesville, S. & R. Co. (Texas), and note, 34 Am. & Eng. R. R. Cas. 97, 102.

McWILLIAMS

v.

PHILADELPHIA AND READING R. CO.

(*Pennsylvania Supreme Court, October* 1, 1888.)

Highway-crossing—Personal Injuries—Nonsuit—Province of Jury.—In an action to recover damages for personal injuries, it appeared that plaintiff was familiar with the dangerous character of the crossing at which he was injured; that he stopped about thirty feet from the track, looked down the track and listened, but did not look up the track because at the place at which he has stopped he could not see along it; that he looked at his watch to see if any train was due, and that, finding none, he drove upon the track. He was struck by an irregular train which approached at a high rate of speed and without any warning. *Held*, that it was error to direct a compulsory nonsuit, and that the question of defendant's liability ought to have been left to the jury.

ERROR to Court of Common Pleas, Northumberland County.

Action by John S. McWilliams against George de B. Keim and another, receivers of the Philadelphia & Reading R. Co., to recover damages for personal injuries alleged to have been caused through the negligence of defendant's employees. At the trial the court, after the introduction of plaintiff's evidence, entered a compulsory nonsuit. The plaintiff moved to take the nonsuit, but the motion was overruled. The following is the opinion rendered upon the refusal of the motion.

CUMMIN, P.J.—"The plaintiff testified that he was familiar with the dangerous character of this road-crossing; that he had crossed it hundreds of times. As he approached the crossing the day of the accident, he was conscious of his danger. He said to his wife, who was in the buggy with him, 'This is the most dangerous crossing that the railroad company has, and I expect some day to hear tell of somebody being killed here.' He stopped at a point about thirty feet from the track, looked down the track and listened. He did not look up the track, because at the place he stopped he could not see up the track. He looked at his watch to see if any train was due. Finding no train was due, and hearing none, he drove on the track. His horse was struck by the engine of the gravel train, the buggy was upset, and he was injured. The plaintiff was driving a gentle horse, who would not scare. He did not look in the direction the train came from, and took no precautions whatever to

ground is that it had conformed strictly to the usage and custom of well-regulated railroads at similar country stations in the construction of its station-house, and the approaches to it, and in providing lights; and that the lights provided were sufficient, and at the service of plaintiff, if he had called for them. On this plea, as we understand the record, the plaintiff took issue. At all events, the record shows no demurrer to it. There was a demurrer to the complaint and to plea No. 3, and these were ruled on. The record shows that the issue was joined on the five pleas, and this was the number left after the court, at a former term, had sustained the demurrer to plea No. 3. If the testimony proved the truth of the material averments of fact contained in plea No. 6, under a well-settled rule of law that would have entitled the defendant to a verdict, whether the plea was sufficient or not. Irion *v.* Lewis, 56 Ala. 190; Mudge *v.* Treat, 57 Ala. 1; Jones *v.* Collins, 80 Ala. 108. Is the plea insufficient if it had been demurred to? Railroad companies and other corporations are persons, artificial persons, it is true, but yet clothed with all the rights, as well as bound by all the obligations, which protect and govern natural persons. Their liabilities are the same, no greater, no less, than those which rest on natural persons in like conditions. An hotel keeper, merchant, shopkeeper, or any other person engaged in business which invites patronage and personal calls, is under an obligation, corresponding to that of a railroad company, to provide for the safety of its visiting customers. If doing business, keeping open doors, and inviting and receiving customers in the night-time intensifies the diligence of the one, it equally intensifies the diligence of the other, the surroundings being similar. If there is a difference, it is only such difference as the number and frequency of invited calls may make; not a difference in kind, but in degree. If railroad corporations, in the administration of their affairs, conform to the rules adopted or in general use by prudently conducted railroads, they are free from blame, unless they violate or disregard some positive requirement of the law, and thereby inflict an injury. Railroad Co. *v.* Allen, 78 Ala. 494; Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518. In the case of Burke *v.* Witherbee, 98 N. Y. 562, the plaintiff's intestate had been killed while working in a mine. A hook had become detached, and a car descended from above, causing the homicide. It was shown that in other mines, as well as this, this appliance was used, and that for over a year it had been in use in this mine night and day, without an accident. It was held that this was a full defence to the action. The court (EARL, J.), in commenting on the facts of the case, said: "It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine-owner for

Liabilities of company as to their premises and appliances.

using an implement which had been employed in different mines, and which under varying conditions, upon countless occasions, uniformly answered its purpose, without injury to anyone." In Lafflin *v.* Railroad Co., 106 N. Y. 136; s. c., 30 Am. & Eng. R. R. Cas. 596, it was said to be a general rule that "where an appliance, machine, or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe, and convenient, it may be continued without the imputation of negligence." That case is a strong authority bearing on the merits of the present suit. See also Loftus *v.* Ferry Co., 84 N. Y. 455. What we have said above is, at best, but the corollary of the generally accepted definition of negligence, "the want of such care as men of ordinary prudence would use under similar circumstances." Shear. & R. Neg. 12. See also Cornman *v.* Railway Co., 4 Hurl. & N. 781. It would be monstrous to hold that, notwithstanding the railroad company did precisely and fully what men of ordinary prudence were in the regular habit of doing under similar circumstances, yet this defendant is liable for the injury the plaintiff suffered therefrom. We cannot affirm that the circuit court erred in refusing to give charges 1 and 2, for the record does not show that in the construction and maintenance of the ticket office, platform, its approaches and lights, the defendant railroad company conformed to what was customary, at similar stations, with well-regulated railroads.

Contributory negligence.

Pleas Nos. 2 and 4 raise the defence of contributory negligence. There was testimony, not disputed, that the platform was only three and a half feet wide; that the steps were of equal width with the door, and immediately in front of it; and that plaintiff was familiar with the place. Going straight out from the door, the plaintiff could not have missed the steps, would not have fallen, would not have been injured. He testified himself that, as he was crossing the platform, he was cautioned to "look out for the steps." There is testimony that he crossed the platform obliquely to the right. But this needed no proof. The fact that he missed the steps, and fell to the right of them, is proof conclusive that he did deflect to the right. Was this not proximate contributory negligence? Was he not the author of his own injury? O'Brien *v.* Tatum, *ante*, 158; Tanner *v.* Railroad Co., 60 Ala. 621; Iron Co. *v.* Jones, 80 Ala. 123; Lilley *v.* Fletcher, 81 Ala. 234, 1 South. Rep. 273; Toomey *v.* Railway Co., 91 E. C. L. 146; Siner *v.* Railway Co., L. R. 3 Exch. 150; 1 Add. Torts, § 34; Wilds *v.* Railroad Co., 24 N. Y. 430; Hulbert *v.* Railroad Co., 40 N. Y. 146; Van Schaick *v.* Railroad Co., 43 N. Y. 527; City of Indianapolis *v.* Cook, 99 Ind. 10; Seymour *v.* Railway Co., 3 Biss. 43. My own opinion is that the plaintiff was guilty of proximate contributory negligence, and that, on the testimony

as deposed to by his witnesses, the general charge ought to have been given in favor of the defendant. My brothers, however, think this was a question for the jury. Reversed and remanded.

Railroad Companies—Duty to Light Station.—In the case of Fordyce, Receiver *v.* Merrill (Ark.), 5 S. W. Rep. 329, the supreme court of Arkansas held that it is the duty of railroad companies to have their stations lighted for the accommodation and safety of passengers arriving or departing upon their trains, and that they are liable to them for injuries resulting from the want of such lights, unless it is shown that the passenger's contributory negligence caused the injury. Thomp. Carr. 108; Buenemann *v.* St Paul, M. & M. R. Co., 32 Minn. 390; s. c., 18 Am. & Eng. R. R. Cas. 153, 20 N. W. Rep. 379; Peniston *v.* Chicago, St. L. & N. O. R. Co., 34 La. An. 777.

Respecting liability of railway company for personal injuries from neglect to light its depot grounds, see Wentworth *v.* Eastern R. Co., 143 Mass. 248; s. c., 3 New Eng. Rep. 355; Stafford *v.* Hannibal & St. J. R. Co., 22 Mo. App. 333; s. c., 4 West Rep. 790; Bishop *v.* Chicago & N. W. R. Co., 67 Wis. 610; Nicholson *v.* Lancashire & Y. R. Co., 3 Hurl. & C. 534; Martin *v.* Great Northern R. Co.; s. c., 30 Eng. L. & Eq. 473; Heinlein *v.* Boston, etc., R. Co., 33 Am. & Eng. R. R. Cas. 500; Alabama, etc., R. Co. *v.* Arnold, 30 Ib. 546, note 556.

CROSS

v.

LAKE SHORE AND SOUTHERN R. CO.

(*Michigan Supreme Court, April* 6, 1888.)

Railroads—Depot Grounds—Recognized Way—Duty of Company.—It is the duty of the railway company to keep a recognized way on its grounds, which is used by the public in going to and from its trains, in a reasonably safe condition.

Same—Defective Grounds—Injury—Liability of Company.—Where there is a hole in depot grounds near a recognized way, so near to such way that a person travelling it might, by making a false step, or by stumbling from the path, fall into it, the railway company will be liable for injury where the plaintiff has exercised proper care.

Same—Evidence.—In such a case it is not error to admit evidence of a civil engineer that the hole was a dangerous place and needed protection.

Same—Failure to Call Witness.—Where a plaintiff who fell into a hole on depot grounds and was injured, fails to call as a witness a person who was with him at the time of the injury, does not raise a presumption that such person would testify against the plaintiff's theory of the accident.

ERROR to review a judgment of the Washtenaw Circuit Court against defendant in an action for injury from negligence in maintaining a way to and from its depot.

The facts are stated in the opinion.

Weaver & Weaver, George C. Greene, and *O. G. Getzendanner* for defendant, appellant.

Sawyer & Knowlton for plaintiff, appellee.

MORSE, J.—The plaintiff sues for injuries received by a fall into a hole upon the station-grounds of the defendant at Pittsford, Michigan.

On the 2d day of October, 1885, the plaintiff, a passenger on defendant's train, reached Pittsford in the night. It was dark and rainy. He lived at Chelsea. Went to Pittsford that day and took passage on defendant's road to Hillsdale. When he returned to Pittsford there were no lights about the grounds outside of the depot. A Mrs. Cole was with him. They left the depot to go to her residence. To reach the main street of the village they had to travel east from the depot. On his way, and while on the grounds of the company, he fell into a hole about 2 feet and 8 inches deep, permanently injuring his ankle. The accident happened about midnight. Mrs. Cole fell into the same hole. Facts.

The station-house of the defendant is about 30 rods west of the main portion of the village. The railroad runs nearly east and west, bearing somewhat to the north as it goes to the west. The principal streets of the village are State and Market streets, crossing each other at right angles some 10 or 15 rods to the north of the railroad. Market street, running east and west, extends to the station-grounds. A few feet to the west is the culvert at the end of which is the hole into which the plaintiff fell. The railroad track or right of way intersects the south line of Market street, cutting it off and reducing its width to about 36 feet at its extreme west end. The station building is on the north side of the railroad track, and the distance from the passenger-depot to the west end of Market street is about 235 feet. From the west end of this street there is a wagonway running westerly along the north side of the railway, north of the station building, and still on west to a north and south highway or Village street,—this route, by the consent of the defendant company, being used by the people of the village and the surrounding country as a public highway past the station, as well as a means of ingress and egress to and from the depot. There are no other means of direct access to the depot by wagons from the west. Along the east end of the depot is a platform over which passengers go to and from the cars. Near the north end of this platform is a gravel and timber walk, extending easterly in a direct line to the south side of the west end of Market street. This walk has been there some fifteen years, and was constructed of timbers 5 by 10 inches, set up edgewise and filled in between,

solid, with gravel,—making a walk somewhat elevated above the ground on either side. This walk was built by the railway company, and kept up by it, for the use of footmen coming to and going from the depot. On the north side of Market street there is, and had been for some years, a plank sidewalk extending from State street to the railway grounds. This was used by many people passing to and from the depot.

It is claimed by the defendant that there was a gravel walk on the south side of Market street, commencing at the termination of the timber and gravel walk of the defendant, and running easterly to State street; but this is denied by the plaintiff. The evidence fails to disclose any considerable travel along the south side of Market street. The testimony shows that the bulk of the foot travel for many years to the depot from the west came along the plank sidewalk on the north side of Market street, and then, diagonally across the wagon road and the culvert, to a point on defendant's timber walk near two trees, and then on the timber walk to the depot. The same route was used, in going from the depot, not only by the public generally, but by the station agent and other employees of the railroad.

It is claimed by the defendant that, at the west end of Market street, the railroad company had for many years maintained a walk, running nearly north and south, connecting the plank walk on the north side of Market street with the east end of the timber and gravel walk of the defendant. This is denied by the plaintiff. The evidence of the witnesses in his behalf tended to show that, at the time of the accident, and for a long time prior thereto, this walk, if it ever existed, had been sunk out of sight, and gone out of use. Also, that the timber and gravel walk of the defendant, terminating at the south side of the west end of Market street, from such terminus west to the two trees, was never used by passengers to any great extent, and, at the time of the injury to plaintiff, had gone to decay, and was not safe—by reason of holes in it,—in the night time, and had not been used for some time.

The testimony of plaintiff's witnesses also tended to show that between this diagonal path and the west end of Market street, and north of the east end of the timber and gravel walk, there was, in wet weather, a mud-hole, which, at the time of the accident, extended so far to the north as to crowd the diagonal path nearer the culvert hole than usual: the travel then being within two feet of it. This hole was not barricaded or otherwise guarded, nor was its presence indicated by any light or other signal.

The main controversy turns upon the right of passengers, coming to or leaving defendant's train, to use this diagonal path, or travelled way. It was insisted upon the trial below, and

it is also argued here, that the railroad company had provided a convenient and reasonably safe means of egress from its cars and station, by the way of the timber and gravel walk, and the crosswalk from that to the plank walk on the north side of Market street; that by so doing the company had fulfilled its whole duty to the public and to its passengers, and, if the plaintiff was injured in an attempt to reach the village by some other route, he can have no remedy against the defendant.

Defendant's argument.

In accordance with this theory the defendant's counsel requested the circuit judge to charge that, "if the plaintiff left the gravel walk, and went diagonally across toward the plank walk, and in so doing fell into this excavation, he cannot recover," and, in other requests, asked instructions of similar import.

The court refused to so charge the jury, but instructed them, in substance, that if the defendant had, without objection, notice, or protest, permitted its passengers to cross its depot grounds on this diagonal line, or walk, then it was its duty to keep its grounds along and near such walk or way in reasonably safe condition for the coming and going of its passengers, by guards, fences, and lights, so as to enable such passengers to avoid any hole or other obstruction by, on, or in which such passengers might be injured. And if the fact of the permission of such use was found as aforesaid, it made no difference that there was another and safer way by which the plaintiff might have passed out. That if this diagonal way had become a public and common way to the knowledge of the defendant for any considerable length of time, so that it became one of the ways, recognized by the company and its agents, to go to and from its depot, then it was their duty to keep it reasonably safe to go and come upon, the same as they would a route which they had actually provided: "and the simple fact that they had provided another way by which every passenger could have gone, and some did go, is not a question at issue in this case."

Instructions given.

I find no conflict in the evidence as to the following facts:

1. The hole into which plaintiff fell was upon the station grounds of the defendant.

2. It was left entirely unguarded by night or by day.

3. The diagonal way was travelled by nearly all the people coming from or going to the depot.

4. No objection was ever made by the railroad company or any of its agents, to its use. The employees of the defendant used it, and it was recognized as the most common way of all, and was, by usage and implied permission, at least, one of the regular ways to and from the depot.

Facts clearly established.

The jury were undoubtedly correct in the finding of facts, and the court was right in his theory of the law.

This diagonal walk being a recognized way to and from the depot, it was the duty of the defendant to keep it reasonably safe. 1 Rorer, R. R. 476; Smith, Neg. 2d ed. 126–188; Cooley, Torts, 605; Delaney *v.* Milwaukee & St. P. R. Co., 33 Wis. 67; Hulbort *v.* N. Y. Cent. R. Co., 40 N. Y. 145; Dillaye *v.* N. Y. Cent. R. Co., 56 Barb. 30; Gaynor *v.* Old Colony & N. R. Co., 100 Mass. 208; Tobin *v.* Portland S. & P. R. Co., 59 Me. 183; Hoffman *v.* N. Y. Cent. & H. R. R. Co., 75 N. Y. 605; Cartwright *v.* Chicago & G. T. R. Co., 52 Mich. 606.

Duty of company as to walk.

The hole in question was so near this diagonal walk, if the testimony on the part of the plaintiff was accepted by the jury, that a person travelling the same might, by making a false step or by stumbling from the path, fall into it. In such case the defendant would be liable for the injury, if proper care was exercised by the plaintiff. Hardcastle *v.* South Yorkshire R. & R. D. Co., 4 Hurlst. & N. 67; Barnes *v.* Ward, 9 C. B. 392; Hadley *v.* Taylor, L. R. 1 C. P. 53; Cooley, Torts, 660; Wood, Nuis. § 271; Add. Torts, § 222; Pickard *v.* Smith, 10 C. B. N. S. 470; Bishop *v.* Bedford Charity, 1 El. & El. 697; Wilkinson *v.* Fairrie, 32 L. J. Exch. Div. 73; Binks *v.* South Yorkshire R. & R. D. Co., 32 L. J. Q. B. Div. 26; Hounsell *v.* Smyth, 29 L. J. C. P. Div. 203; Wettor *v.* Dunk, 4 Fost. & F. 298; Indermaur *v.* Domes, L. R. 1 C. P. 274.

The situation of this hole, its proximity to the travelled path, and whether the plaintiff was negligent in falling into it, were questions of fact for the jury, and were properly submitted to them.

The court did not err in instructing the jury that it was a question of fact for them to determine, if they found this diagonal way a common one, and the defendant permitted passengers to use it, whether or not the defendant should have kept some guide, guard, or light, or some way by which a man would be kept out of it. It was for the jury to locate this hole in its relation to the pathway; and if they found it so near the way that a man, in the "ordinary aberrations of travel," might fall into it, then, as a matter of law, it should have been guarded.

Question for jury.

The defendant cannot complain, because, under all the evidence, this hole was upon the station-grounds of the company, and near enough to be dangerous to persons travelling the diagonal way at night. The court could have safely told the jury that, if they found this way recognized and permitted by the railroad company, it was negligence in the defendant leaving it in the condition it was.

There was no error in the admission of evidence. The testimony of the civil engineer (Davis) that this hole was a dangerous place and needed protection comes squarely within the rule settled in this State in the case of Laughlin *v.* Grand Rapids Street R. Co., 26 Am. & Eng. R. R. Cas. 377.

Evidence—Testimony of engineer.

Mrs. Cole, who was injured at the same time by falling into the same hole, was not called by the plaintiff as a witness in his behalf, and she did not testify upon the trial. The defendant's counsel requested the court to charge the jury "that the failure to call Mrs. Cole, by the plaintiff,—the unexplained failure,—is a matter that the jury may take into consideration as to whether or not her testimony would have hurt the plaintiff if he had called her."

Failure to call witness injured at same time.

The court refused to so charge, and said: "It would be, in my opinion, equally forcible if the other side should ask me to charge that, because the defendant failed to bring Mrs. Cole here, her evidence would have been against them, and she would swear as Cross has. The presumption is as much one way as the other."

We think the court was correct in his refusal, and right as to the presumption. If she was within reach of the process of the court, either party had, as far as the record shows, equal facilities for bringing her into court as a witness, and the mere fact that either failed to do so raised no presumption that she would testify against their particular theory of the accident. But there was nothing to show that she was accessible as a witness. The counsel for the defendant had the right to make such proper comments upon her absence as the facts warranted, but he had no right to call upon the court to instruct the jury that her absence militated against the plaintiff, or that they might guess that she was not called by him because her version of the transaction would have hurt his case.

Neither do we think that the story told by the court had any tendency to injure the defendant. The propriety of it may well be doubted, but we are not prepared to hold that its recital or application was harmful error. The case, under the conceded facts, seems to be a plain one; and we have no doubt that the finding of the jury was correct, and the case fairly tried and correctly submitted, under the law, by the court.

The judgment is therefore affirmed, with costs.

SHERWOOD, Ch.J., and LONG, J., concurred; CHAMPLIN, J., did not sit.

Railroads—Depot Grounds—Route to Street—Injury.—It is not the duty of the passenger, immediately on leaving the cars at the station, to take the shortest practicable route to the nearest highway. Keefe *v.* Boston & A. R. Co., 142 Mass. 251.

Same—Care Required.—In its approaches to its trains and station-grounds, a railroad company is held to the exercise of reasonable care for the safety of its passengers, but not to the utmost care which human foresight can furnish in providing egress. Wentworth *v.* Eastern R. Co., 143 Mass. 248; s. c., 3 N. Eng. Rep. 355; Moreland *v.* Boston & P. R. Corp., Mass. ; s. c., 1 N. Eng. Rep. 909; Stafford *v.* Hannibal & St. J. R. Co., 141 Mass. 31; s. c., 4 West Rep. 790; Caswell *v.* Bost. & W. R. Co., 98 Mass. 194; s. c., 93 Am. Dec. 150; Simmons *v.* New Bedford, V. & N. S. Co., 97 Mass. 361; s. c., 93 Am. Dec. 99; Warren *v.* Fitzburgh R. Co., 90 Mass. (8 Allen) 227; s. c., 85 Am. Dec. 700; Southern R. Co. *v.* Kendrick, 40 Miss. 374; s. c., 90 Am. Dec. 332; March *v.* Concord Corp. 29 N. H. 9; s. c., 61 Am. Dec. 631; Pittsburgh, F. W. & C. R. Co., *v.* Hines, 53 Pa. St. 512; s. c., 91 Am. Dec. 224.

Railroad companies as carriers of passengers are bound to the most exact care not only in the management of its trains and cars, but also in the structure and care of its track, and in all subsidiary arrangments necessary to the safety of passengers. See Knight *v.* Portland R. Co., 56 Me. 234; s. c., 96 Am. Dec. 449. Thus it has been held, that a railway company is bound to keep all the approaches to its depots safe and convenient for use, even though the same may be within the limits of the highway; Quinby *v.* Boston & Me. R. Co., 69 Me. 340.

Same—Defective Depot Grounds—Stepping in Hole.—It is said in the case of Knight *v.* Portland R. Co., 56 Me. 234; s. c., 96 Am. Dec. 449, that a railroad company is bound, as a carrier of passengers, to the most exact care in the construction and maintenance of its track, and all subsidiary arrangements necessary to the safety of passengers, and that a wharf, which is a passageway for those going to and from the cars, is a subsidiary arrangement which passengers have the right to require to be safe and that where a passenger of such company passing over the wharf steps in a hole and is injured, the railroad company will be liable for such injury.

To allow a hole to remain long in a railway platform is negligence. Louisville & N. R. Co. *v.* Wolfe, 80 Ky. 82. See also note, 33 Am. & Eng. R. R. Cas. 509.

Same—Passage to Mail Train—Duty of Company.—It was held in the case of Hale *v.* Grand Trunk R. Co. (Vt.), 15 Atl. Rep. 300, that it is the duty of a railroad company to furnish a reasonably safe passage to and from its mail-cars for the purpose of mailing letters while stopping at its regular stations where such company carries the mail under a contract with the government of the United States, by whose regulations postal clerks on mail-trains are required to receive at the cars stamped letters and sell stamps; and that a failure to provide such passage is actionable negligence. In the course of the opinion the court say: "As a part of the service which the defendant was performing for the government, and for which it was receiving compensation from the government, it was under a duty to furnish the public a reasonably safe passage to and from its mail-trains while stopping at its regular stations, for the purpose of purchasing stamps and mailing such letters. The plaintiff was a member of the public, and was attempting to pass over the platform, provided by the defendant, to the mail train, for the lawful purpose of mailing two letters. By accepting the carriage of the mail for the government, the defendant became under the duty to furnish him a reasonably safe passage to its mail train for the purpose of mailing his letters. In attempting to pass over the platform to its mail train for this purpose, the plaintiff was neither a trespasser, intruder, nor loafer, but was there to transact business which the defendant had undertaken to do with him, for a compensation received from the government; in fact, was there at the invitation of the defendant to transact business which it had been hired to perform for and

with him by the government. The duty of the defendant to furnish the plaintiff a reasonably safe passage to its mail train to mail his letters was none the less binding or obligatory because the compensation received therefor came from the government rather than the plaintiff. A holds a regular passenger-ticket over a railroad. The duty of the company operating the road, to carry him safely, is none the less binding, nor are his legal rights, if injured, in the least abridged because the ticket was paid for by the money of B., rather than with his own money. The government derives a large part of its revenue with which it pays for the mail service by the sale of postage stamps to whomsoever of the public may desire to use that arm of its service. The money which the plaintiff had paid for the postage stamps upon the letters he was carrying, or which he would have paid the postal clerk for stamps to use upon the letters was indirectly a payment to the defendant for the service which it was about to perform for the plaintiff in carrying the letters which he was about to post, on the way towards their destination. But whether the plaintiff paid indirectly to the defendant for the service and accommodations which it was under a duty to furnish him, or the government paid therefor and gave it to the plaintiff, does not vary the defendant's duty to furnish him a reasonably safe passage to the mail car for the purpose of mailing his letters; nor are his legal rights thereby abated. Actionable negligence is a failure in legal duty which occasions an injury to a party free from contributory negligence, or who has not failed in the discharge of his duty in the given circumstances. This is conceded by the counsel for the defendant. They have also conceded, in the agreed case, that the plaintiff exercised due and proper care on the occasion. They only contend that the defendant was under no legal duty to furnish the plaintiff a reasonably safe passage to the mail car for the purpose of mailing his letters, mainly because he was to pay the defendant nothing therefor directly. But, as we have already endeavored to show, that fact would not relieve the defendant from the duty, inasmuch as it was paid by the government for discharging that duty to the public; that is, to any person who had occasion to go to the mail car, when stopping at regular stations, to transact any lawful business with the servants of the government."

OSBORNE

v.

LONDON AND NORTH WESTERN R. CO

(*L. R.* 21 *Q. B. Div.* 220.)

Railway Company—Depot Grounds—Negligence—Injury to Passenger—Contributory Negligence.—The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used, and he admitted that he knew that the steps were dangerous, and went down carefully, holding the hand-rail. *Held*, that the defendants had not shown that the plaintiff, with a full knowledge of the nature and extent of the danger, had voluntarily agreed to incur it, so as

to make the maxim that "an injury cannot be done to a willing person" applicable, and therefor he was entitled to recover.

APPEAL by the defendants from the judgment of the judge of the county court at Birmingham in an action to recover damages for personal injury alleged to have been caused by the negligence of the defendants in allowing a flight of steps to be in a dangerous condition.

The plaintiff in his evidence at the trial stated that he was a season-ticket holder on the defendants' line, that on the morning of March 21, 1887, he went down the steps to the platform of the station at Perry Barr to take the train to Birmingham, that he went down a flight of stone steps leading to the platform, which were covered with a light layer of snow which had been trodden down and frozen over, that the steps were worn and hollowed, and were slippery, that he went down carefully and not in a hurry, but slipped on the steps, and fell, and dislocated his wrist.

In cross-examination he said that there were wooden steps leading to the platform on the other side of the line, that his train started from the platform to which the wooden steps led, that sometimes he went one way and sometimes the other, that the stone steps were on the side nearest to his house, that by going down the stone steps and crossing the line he saved going round by the bridge by which the road was carried over the railway, that the steps were dangerous without snow, that he thought it was dangerous to go down, and went down carefully, and took hold of the rail to prevent slipping, that he thought holding the rail was sufficient.

The county court judge was of opinion that the accident was primarily caused by the worn and defective state of the steps, which was aggravated by the frosty weather, which made them slippery in addition, that the steps had not been properly and efficiently swept and cleaned from the caked snow, which, added to the worn condition of the steps, caused the plaintiff to fall, and that there was no contributory negligence on the part of the plaintiff, and gave judgment for the plaintiff for 25*l.*, the amount being agreed.

WILLS, J.—I am of opinion that this appeal ought to be dismissed.

Thomas v. Quartermaine considered.

The case, which has been very ably argued on both sides, is not free from difficulty, for it is one of a numerous and increasing class of cases, in which the difficulty arises which was brought about by Thomas *v.* Quartermaine, 18 Q. B. D. 685, a decision which has often been cited, and has been the subject of much criticism. That this difficulty exists is clear from the judgments in Yarmouth *v.*

France, 19 Q. B. D. 647. It is difficult to reconcile the view there expressed by Lindley, L.J., 19 Q. B. D. 660, with regard to Thomas *v.* Quartermaine, 18 Q. B. D. 685, with what is said by Lopes, L.J., 19 Q. B. D. 667. It is necessary in all cases to be careful in the application of that decision, and to see that no fallacy is introduced in applying it to the particular case under consideration. For the purposes of the present case it is enough to take the view expressed by Lord Esher, M.R., in Yarmouth *v.* France, 19 Q. B. D. 657, where he says, "I see nothing in the decision in Thomas *v.* Quartermaine, 18 Q. B. D. 685, to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

Qualification of maxim Volenti non fit injuria.

It seems to me to follow that in such a case as the present, where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim "Volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." I agree with Mr. Wills that this is a question of fact, and, this being so, it follows that the defendants could not succeed unless either they had a finding of fact in their favor, or we had all the facts before us, so that we were in a position to decide the question. I entertain some doubt as to how far this question has been dealt with by the county court judge. Mr. Young says it was argued before him, but it does not appear that he gave any specific decision on it. It may be that he said nothing about the question because it seemed to him to be quite clear, and if that were so he would not have found the fact in favor of the defendants; or he may have inadvertently omitted to refer to the point, in which case it would be open to us to deal with it. If I had had to decide this point as a question of fact I should have thought it necessary that the plaintiff should be asked more questions than he was asked in cross-examination. It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of Lord Esher, M.R., in Yarmouth *v.* France, 19 Q. B. D. 657, which I have already quoted, and those of Bowen, L.J., in Thomas *v.* Quartermaine, 18 Q. B. D. 696, which were referred to in the course of the argument. Those observations go far to make it hard for a defendant to succeed on

such a defence as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped. These judgments introduce an important qualification of the maxim "Volenti non fit injuria."

Plaintiff's misapprehension of danger.

In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow; I know quite enough about ice and snow to know how easy it is to make such a mistake, and it is one that has cost many a man his life. In order to succeed the defendants should have gone further in cross-examination, for, unless the question of fact had been found in their favor, the application of the maxim on which they relied could not be established. The county court judge has not found the fact the defendants need; and upon the present materials I certainly am not prepared to supply the deficiency.

For these reasons, the onus of proof being on the defendants, I think that on the evidence as it stands their defence is not made out, and therefore their appeal must be dismissed.

GRANTHAM, J.—I am of the same opinion.

Maxim not applicable.

I think that the judgment of Bowen, L.J., in Thomas *v.* Quartermaine, 18 Q. B. D. 685, confirms the view which I take, that the maxim "Volenti non fit injuria" does not apply to such a case as the present. If it did it would go to the root of the liability of all persons who would otherwise be liable to provide safe premises or safe machinery. For instance, in the case of a stage coach, if a passenger sees that one of the horses is vicious, is he bound to stay at home and give up his journey, or if he does not do so, and suffers injury, is he to lose all remedy? The same considerations would apply in the case of a railway. It seems to me that the whole difficulty in the present case arises from the answer of the plaintiff to a question put to him in cross-examination being too much relied on. What he meant was that he knew there was some danger in going down the steps, and that it was necessary to be careful, but he thought he could get down safely with the assistance of the hand-rail. The only chance for the defendants was to show contributory negligence on the part of the plaintiff, and this they have failed to show.

Appeal dismissed; leave to appeal refused.

Railroad Companies—Condition of Premises.—As to the duties of railroad companies to maintain safe depot grounds and premises, see, *ante*, Cross *v.* Lake Shore & M. S. R. Co. 476, and note 481–483.

Same—Approaches to Depot.—It was held in case of Quinby *v.* Boston

& M. R. Co., 63 Me. 340, that it is the duty of a railway company to keep all approaches to its depot safe and convenient for use, even though the same may be within the limits of the highway.

See Generally as to Defective Station Approaches and Appointments, Reed *v.* Richmond & A. R. Co., 33 Am. & Eng. R. R. Cas. 503; note 509.

SIMKIN *et al.*

v.

LONDON AND NORTH WESTERN R. CO.

(*L. R.* 21 *Q. B. Div.* 453.)

Railway Company—Negligence at Station—Blowing off Steam.—In an action against the defendants, a railway company, it appeared that the plaintiffs were leaving a station, belonging to the defendants, in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station, which was blowing-off steam, and the carriage was upset and the plaintiffs injured. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient, but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident. *Held*, by the court of appeal (Cotton, Fry, and Lopes, L.JJ.); (Fry, L.J., doubting), that the defendants were not liable, as there was no evidence of any obligation on their part to screen the railway from the road.

ACTION by the plaintiffs, a mother, son, and daughter, to recover damages for injuries which they had sustained by the upsetting of a carriage, caused, as they alleged, by the negligence of the defendants.

At the trial before Manisty, J., and a jury, it appeared that the two female plaintiffs arrived by the defendants' railway at the Bletchly station, and were there met by the son in a wagonette. As they were driving out of the station inclosure, the horse was frightened by an engine on the line, blowing off its steam. The engine was just starting, and was blowing off the steam in intermittent blasts; the horse got out of the control of the driver, and, in going out of the gate, the carriage was upset and the plaintiffs severely hurt. The evidence adduced at the trial as to the accident and the situation of the defendants' station with regard to the roadway is fully considered in the judgment of the court. The plaintiffs had alleged, as particulars of negligence: (1) That the steam was blown off in an unnecessary and improper manner; (2) that the engine was defective and improper; (3) that the roadway forming the approach to the station was narrow, and inconvenient for the ordinary purpose of traffic to

or from the station; (4) that the line of railway at the station was not properly and sufficiently screened from the roadway forming the approach to the railway. The second and third grounds of complaint were abandoned at the trial, and the jury found the first in favor of the defendants; but they found that the defendants had been guilty of negligence in not properly and sufficiently screening the railway from the road, and that such negligence had caused the accident. The learned judge entered judgment for the plaintiffs.

Upon application to enter the verdict for the defendants on the ground that there was no evidence of negligence on their part, or for a new trial, the divisional court (Huddleston, B., and Charles, J.) set aside the verdict and gave judgment for the defendants.

The plaintiffs appealed.

Lockwood, Q.C., *E. Tindal Atkinson*, Q.C., and *C. M. Atkinson* for the plaintiffs.

Sir E. Clarke, Q.C., S.G., and *Forbes Lankester* for the defendants.

Solicitors for plaintiffs: *Cowper, Thorowgood & Tabor* for *Bond, Barwick & Peake*, Leeds.

Solicitor for defendants: *C. H. Mason.*

Facts—Grounds of complaint.

LOPES, L.J., delivered the judgment of himself and COTTON, L. J.—This is an action brought by the plaintiffs against the defendants to recover damages for alleged negligence causing personal injuries to the plaintiffs. The plaintiffs alleged negligence in the following respects: First, because the defendants' servants negligently caused a locomotive engine to blow off steam with a loud noise and in an unnecessary and improper manner; secondly, because the engine was defective and improper; thirdly, because the roadway forming the approach to the defendants' station was narrow, and inconvenient for the ordinary purposes of traffic to and from the station; fourthly, because the defendants' line of railway at the station was not properly and sufficiently screened from the roadway forming the approach to the railway. The second and third grounds of complaint were abandoned at the trial, and the jury found the first cause of complaint in favor of the defendants. It must therefore be assumed that the engine was neither defective nor improper, that the roadway was neither narrow nor inconvenient, and that the defendants' servants were not guilty of negligence in blowing off the steam with a loud noise and in an unnecessary and improper manner, and so causing the accident. But the jury found that the defendants were guilty of negligence in not properly and sufficiently screening the railway from the road, and by such

negligence caused the accident to the plaintiffs. An application was made to a divisional court to enter judgment for the defendants on the ground that there was no evidence of any negligence on the part of the defendants in not properly and sufficiently screening their railway from the road, and no evidence of their causing the accident to the plaintiffs by such negligence, and in the alternative for a new trial. The divisional court was of opinion that there was no evidence to justify the findings of the jury, and accordingly entered judgment for the defendants. Against this decision of the divisional court, the plaintiffs have appealed. The plaintiffs were bound to give evidence upon which a jury would be justified in finding that the defendants were negligent in not sufficiently and properly screening their railway from horses coming to their station; and also that this particular negligence caused the accident to the plaintiffs. If they did not give evidence which would justify a jury in finding both these questions for them they failed. We will deal with the two questions separately. Was there any evidence of negligence by the defendants in respect of not sufficiently and properly screening their railway from the road? Negligence would mean the omission by the defendants to do something which persons conducting a railway with reasonable care and caution should do. It is said the defendants were wanting in reasonable care towards those who left their station, because they did not erect a fence between the roadway to the station and the railway itself sufficient to prevent the horses of passengers coming to and going from their station seeing and hearing the engines on the railway. There is no statutory obligation to erect such a screen. The company were carrying on a business authorized by the legislature. The duty which the defendants owed the plaintiffs was to provide a reasonably safe mode of leaving their station, having regard to the business they carried on at their station. There was a wooden open paling five feet high between the roadway and the railway. There was forty feet between the metals of the railway and this paling. The station and the paling and the roadway had been in their then condition for twenty years. Three hundred trains arrive at this station in twenty-four hours. There was no suggestion that any accident had ever been caused by the insufficiency of this paling or screen. No person was called to say it was improper or insufficient. There was no evidence of its being improper or insufficient beyond the paling itself. We should hesitate long in such circumstances to hold that the paling by itself was any evidence of negligence in the defendants. In a vast number of railway stations the same state of things exist. Take, for example, the Great Western arrival platform at Paddington, where the carriages and cabs come to

Negligence in not screening railway from road.

meet arriving passengers. They draw up and remain awaiting the arrival of the train within twenty feet of the incoming train, the engine of which passes them without any screen or anything interposed between the engine and the horses. Could it be successfully contended that, if a horse became frightened at the sight or noise of the engine and ran away, injuring those in carriage or cab, an action would lie against the Great Western Railway? Take the case of a highway carried over a railway by a bridge. The parapets on either side do not conceal the passing train from horses crossing the bridge; indeed, horses are constantly terrified by the noise, the sight, and the smoke of the passing train. Is it to be said that railways ought to erect parapets on either side of their bridge high enough to conceal the approaching engine? Such contentions could not, in our opinion, be for one moment entertained. We cannot think that in this case there is any evidence that ought to have been left to a jury, of negligence by the defendants in not sufficiently and properly screening their railway from the road.

Whether failure to screen road caused injury.

But, assuming we are wrong in this, then the further question arises—whether this particular negligence (i.e., the not sufficiently and properly screening the railway from the road) caused the accident to the plaintiffs. It appears to us, the only reasonable inference to draw from the evidence is that the horse was frightened and the accident caused, not by what the horse saw, and which an opaque screen might have prevented him seeing, but by the noise which the engine made—an engine proper in all respects—noises which the jury have found not to have been unnecessary or excessive, noises which the defendants by their engines were entitled to make, noises which were a necessary incident to the carrying on of that business which the legislature had authorized, and noises which no screen could have prevented. Take Mr. Peake's account, who drove the horse, and to whom the horse belonged. He says: "The horse started perfectly quiet from the station; there was a hissing noise from the engine, and the horse pricked his ears; I looked up and saw an engine in front of me. The intermittent noise kept going on, and the horse kept continually quickening his pace at each blast of the engine. At each blast of the engine he sprang, and I felt he was getting out of hand. I kept holding him in and he kept springing forward, and at each stroke he got more out of hand." Again, take Mr. Simkin's account. "The horse," he says, "was going quietly up to the time he heard the first steam emitted, and then he sprang forward, considerably quickened his pace, and each time that he heard the steam coming forward he gradually got faster and faster: the horse, each time he heard the noise, got faster and faster." Again, Miss Florence Simkin says: "When I reached

the end of the station buildings, I heard a noise like the whizzing of an engine; as each blast of the steam came, the horse sprang forward." Curtis also speaks of the noise of the engine frightening the horse; and he also says Peake had got in front of the engine before it moved. The only reasonable inference deducible from the evidence, to our mind, is the inference that it was the noise and not the sight of the engine which frightened the horse and caused the accident. We are therefore of opinion that even if the defendants were negligent in not screening their railway from the sight of this horse, that there is no evidence in the case which would justify a jury in saying that such negligence caused the accident. The appeal must be dismissed.

FRY, L.J.—The railway company were under an obligation to provide means of access to and egress from their station, reasonably safe and suited for the carrying on of the business which their act of Parliament authorized them to carry on. The question in this case is whether it was reasonably safe. The blowing off of steam from the railway engine had the effect of creating a hideous noise by fits and starts, and the engine also presented a somewhat startling appearance. The structure of the station in question was such that the horse, while standing at the station, would be sheltered from the engine; but as the horse was driven out and emerged from the shelter, he found himself in close proximity to the engine, which was blowing off steam, and which also presented a hideous and terrifying aspect. I cannot help thinking that in this structure of the station there was a very probable source of danger to persons driving to and from the station. The question is whether this danger would have been lessened by placing a screen as suggested. It would no doubt have shut out the sight of the engine, which was blowing off steam, from the horse, and have deadened the noise made thereby. It was not unreasonable for a jury to come to the conclusion that the steam blown off would have been less terrifying if a screen had been there.

Duty of company as to means of access and egress —Blowing off steam.

The next question is whether there is any evidence that the want of a screen in this particular case was the cause of the accident that has occurred. The evidence shows that it was the sound of the steam, rather than the sight of the engine, that terrified the horse. The engine began to make a noise before the horse left the shelter of the station and got in sight of the engine. The noise was at first deadened by the buildings; but when the horse emerged, it saw the engine and it heard the noise more distinctly. If it was left to my judgment, without the influence which is exercised on it by the previous decisions of other judges, I should say that there

Cause of the accident.

was evidence which would justify the jury in finding that it was the want of the screen which was the very cause of the accident in the present case. But I cannot shut out from my mind that there has been a long series of decisions in which, under circumstances not unlike the present, judges have exercised great subtilty in narrowing the findings of the jury in similar cases. I do not say that the rights of the jury have been infringed, but that judges have held a tight rein over them. The reason of this was that the judges felt that in the conflict before a jury between an individual, who excited sympathy and a railway company, which excited none, the jury should be kept in hand with regard to the verdicts which they found. My mind is out of sympathy with many of these cases, and I believe that, if left to myself, my decision would not have been that of the great majority of judges who have tried similar cases. But I feel that the view now taken by my two learned brethren Cotton and Lopes, L.JJ., is more in accordance with previous decisions. Consequently I do not dissent from their opinion, but I give my assent with great reluctance.

Appeal dismissed.

Liability of Company Where Horses Take Fright at Cars, etc.—See Cleveland, C. C. & I. R. Co. *v.* Wynant, and note, *ante*, p. 328–333.

SCHLOSS

v.

WOOD.

(*Colorado Supreme Court, April* 27, 1888.)

Common Carriers—Who Are.—A common carrier is one who undertakes as a business for hire or reward to carry from one place to another the goods of all persons who may apply for such carriage.

Same—Evidence—Advertisement, etc.—Whether a person is a common carrier depends upon whether he holds himself out to the world as such; by engaging in the business generally, or by announcing or proclaiming it by cards, advertisements, or by any other means that would let the public know that he intended to be a common carrier for the public, a person may fix upon himself the character of a common carrier.

Same—Province of Jury.—Where there is evidence tending to establish that parties acted in the capacity of common carriers; that they were engaged in receiving merchandise from a railroad company at the terminus of its line of road and transporting the same to a neighboring town; that they had an office at such town, where freight bills were collected, and custom solicited; and that they were doing business for the general public,

—it is for the jury, under proper instructions, to say whether they are common carriers.

COMMISSIONERS' decision. Appeal from Lake County Court.

Action for services brought by H. M. Wood and G. S. Wood against J. Schloss. Defendant, in his answer, counter-claimed for damages. Judgment for plaintiff. Defendant appeals.

J. L. Murphy for appellant.

Clinton Reed for appellees.

STALLCUP, C.—This action was commenced by appellees upon a demand against appellant for certain services rendered and certain charges paid in forwarding, from Weston to Leadville, 120 half-barrel kegs of beer. The appellant, in his answer, counter-claimed for damages, occasioned, as alleged, by the fault of appellees in negligently failing to protect the beer from freezing, in consequence whereof 89 kegs of the said beer were lost and destroyed; and also alleged that appellees were common carriers, and as such received and carried the beer; and that while so carrying the beer from Weston to Leadville the said freezing and loss occurred. From the evidence it appears that in the month of February, 1880, the beer had been sent from St. Louis by railway to Weston, the end of the railway at that time, and there by appellees received and sent to Leadville by wagons. The evidence tended to show that the beer was in good order when received at Weston; that the weather was very cold; that the beer was taken out of the railway car by appellees at Weston about three hours before it was loaded on the wagons; that some hay was put around it in the wagons to protect it from freezing; that the kegs in the centre, as loaded on the wagons, were the kegs that did not freeze; that 89 kegs were burst, and the beer lost therefrom, when the kegs were delivered at Leadville; that appellees presented to appellant their bill for the charges, including the freight from Weston to Leadville; that the appellees kept an agent in their business at Denver and at Leadville; that prior to the arrival of the beer at Weston one of the appellees called upon appellant at Leadville, when appellant said to him that the beer was on the road, and requested that appellees ship the beer on to Leadville on arrival at Weston, and that it should be protected from freezing by putting building paper and hay around it. The jury returned a verdict for appellees for $604, the amount of their demand. Judgment was given upon the verdict, and this appeal was taken to reverse this judgment.

Facts.

Upon the trial appellees adduced evidence tending to show that they acted in the premises as forwarders merely, while the appellant adduced evidence tending to show that they were common carriers, and accordingly acted in the premises. The

court took the question upon this issue from the jury by the following instruction: "The defendant sets up as a further defence that the plaintiffs were common carriers, and consequently insurers of the goods, and that if any injury happened to the beer in transit, that they were responsible, unless that damage was occasioned by the act of God, or the public enemy. I will take the liberty of saying to you that there is nothing in this case upon which you can hold these plaintiffs as common carriers." Had the evidence all been in support of the appellees upon this issue, this action of the court would have been warranted, but the evidence was not all this way upon this issue. Witness May testified as follows: "*Question.* Where did you reside in the months of January and February, 1880? *Answer.* In Leadville, Colo. *Q.* Were you engaged in any business at that time? If so, what was it? *A.* I was in the clothing business. *Q.* Do you know the plaintiffs, Wood Bros.? *A.* Yes, sir; have known them for three years. They were in the transfer business from Weston and Buena Vista to Leadville. They were engaged in this business about the latter part of 1879 and 1880. *Q.* What do you mean by transfer business? *A.* To receive merchandise from the railroad company and deliver them to parties consigned. *Q.* When goods were consigned to persons here in Leadville, which goods came over some of the roads leading to Weston or Buena Vista, where did Wood Bros. deliver the goods? At what place? *A.* They delivered them at Leadville. *Q.* Did the Wood Bros. carry any goods for you, from the end of the track at Weston to Leadville? *A.* They did. *Q.* In what manner and to what extent did they carry goods for you from the end of the track, at Weston? *A.* They brought them in wagons. *Q.* You may give the manner of collecting for the carrying of goods. *A.* The money was collected by their collector. *Q.* Did they have any houses or offices for carrying on their business? And if so, where? *A.* They had an office in this city, corner Sixth and Poplar streets, and one at the end of the track. *Q.* What part of the business was transacted at the Leadville end of the line by plaintiffs? *A.* Collecting freight bills and soliciting patronage. *Q.* What was the extent of their business? *A.* They were doing business for the general public. *Q.* How do you know they were doing business for the general public? *A.* Mr. Wood told me they were hauling for a great many of our neighbors, and would like to haul for us." There was considerable other evidence to the same effect.

Who are common carriers?

A common carrier is one who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage. Hutch. Carr. § 47, and note. And the same author, at section 62, states the distinction between forward-

ers and common carriers, as follows: "Warehousemen, wharfingers, and forwarders of freight, so long as they confine themselves to the business which their names import, cannot be held liable as common carriers. If goods are deposited with them merely as the initiatory step towards starting them *in itinere*, they have undertaken to do no more than to safely keep them and forward them when opportunity offers; and being in nowise interested in their carriage after delivery to the carrier, it would be contrary to the well-settled principles of the law to hold them to the responsibilities of common carriers. But if they combine the two characters, treating the deposit with them as being merely for the convenience of further carriage, or to encourage or promote their business as common carriers, they will be held to a strict liability as such from the time of the delivery to them. In such cases the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, and the liability as carrier begins with the receipt of the goods." And Bouvier defines a forwarder as "a person who receives and forwards goods, taking upon himself the expense of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight." Whether a person is a common carrier depends wholly upon whether he holds himself out to the world as such, and he can hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it by cards, advertisements, or by any other means that would let the public know that he intended to be a common or general carrier for the public. Railway Co. *v.* Nichols, 9 Kan. 252, 253. Were the appellees acting in the premises as common carriers, or forwarders merely? This question should have been submitted to the jury with proper instructions. The error of the court in not doing so was prejudicial to appellant, as his counter-claim rested upon the alleged facts that appellees were common carriers, and accordingly received and carried the beer from Weston to Leadville, and upon the law imposing the liability upon common carriers in such cases. This court has defined such liability in the case of Express Co. *v.* Carroll, 7 Colo. 43, 1 Pac. Rep. 682.

The judgment should be reversed, and the case remanded.

DE FRANCE and RISING, CC., concur.

PER CURIAM.—For the reasons assigned in the foregoing opinion, the judgment is reversed and the cause remanded.

Who are Common Carriers.—The following have been held to be common carriers:

1. *Cartmen, draymen, and porters* who undertake as a common employment to carry goods from one part of the town to another for hire. McHenry *v.* Philadelphia W. & B. R. Co., 4 Harr. (Del.) 448; Powers *v.* Dav-

enport, 7 Blackf. (Ind.) 497; s. c., 43 Am. Dec. 100; Robertson *v.* Kennedy, 2 Dana (Ky.), 431; Campbell *v.* Morse, Harp. (S. C.) L. 468. And the same is true where they transport or carry from one town to another. See Lecky *v.* McDermott, 8 Serg. & R. (Pa.) 500; Gordon *v.* Hutchinson, 1 Watts. & S. (Pa.) 285.

2. *Express Companies.*—See Southern Express Co. *v.* Crook, 44 Ala. 468; Southern Express Co. *v.* Newby, 36 Ga. 635; Gulliver *v.* Adams Express Co., 38 Ill. 503; American Express Co. *v.* Pinckney, 29 Ill. 392; Baldwin *v.* American Express Co., 23 Ill. 197; s. c., 26 Ill. 504; Buckland *v.* Adams Express Co., 97 Mass. 124; Lowell Wire Fence Co. *v.* Sargent, 90 Mass. (8 Allen) 189; Christenson *v.* Adams Express Co., 15 Minn. 270; Sweet *v.* Barney, 23 N. Y. 335; Sherman *v.* Wells, 28 Barb. (N. Y.) 403; Haslam *v.* Adams Express Co., 6 Bosw. (N. Y.) 235; Read *v.* Spaulding, 5 Bosw. (N. Y.) 395; United States Express Co. *v.* Backman, 28 Ohio St. 144; Stadhecker *v.* Combs, 9 Rich. (S. C.) L. 193; Southern Express Co. *v.* Womack, 1 Heisk. (Tenn.) 256; Southern Express Co. *v.* McVeigh, 20 Gratt. (Va.) 264; Bank of Kentucky *v.* Adams Express Co., 93 U. S. (3 Otto) 174; bk. 23, L. ed. 872.

This includes city express companies Richards *v.* Westcott, 2 Bosw. (N. Y.) 589, and express freight lines. Read *v.* Spaulding, 5 Bosw. (N. Y.) 395.

Same—Limiting Liability.—Such companies cannot limit their liability by stipulating in their contract that they are not common carriers but simply forwarders, and therefore not liable for the negligence of those whom they employ to do the actual carrying. Buckland *v.* Adams Express Co., 97 Mass. 124; Russell *v.* Livingston, 19 Barb. (N. Y.) 346; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 27; United States Express Co. *v.* Backman, 28 Ohio St. 144; Bank of Kentucky *v.* Adams Express Co., 93 U. S. (3 Otto) 174; bk. 23, L. ed. 872. *Compare* Christenson *v.* American Express Co., 15 Minn. 270; Hersfield *v.* Adams Express Co., 19 Barb. (N. Y.) 577; Read *v.* Spaulding, 5 Bosw. (N. Y.) 404; Southern Express Co. *v.* McVeigh, 20 Gratt. (Va.) 264.

3. *Ferrymen.*—Babcock *v.* Herbert, 3 Ala. 392; Pate *v.* Henry, 5 Stew. & P. (Ala.) 101; Harvey *v.* Rose, 26 Ark. 3; Griffith *v.* Cave, 22 Cal. 535; Self *v.* Dunn, 42 Ga. 528; Claypool *v.* McAllister, 20 Ill. 504; Fisher *v.* Clisbee, 12 Ill. 344; Whitmore *v.* Bowman, 4 G. Greene (Iowa), 148; Slimmer *v.* Merry, 23 Iowa, 90; Hall *v.* Renfrow, 3 Met. (Ky.) 51; Joy *v.* Winnissimmet Co., 114 Mass. 63; Miller *v.* Pendleton, 75 Mass. (8 Gray) 547; White *v.* Winnissimmet Co., 61 Mass. (7 Cush.) 155; Powell *v.* Mills, 37 Miss. 691; Richards *v.* Fuqua, 28 Miss. 793; Pomeroy *v.* Donaldson, 5 Mo. 36; Wyckoff *v.* Ferry Co., 52 N. Y., 32; Ferris *v.* Union Ferry Co., 36 N. Y. 312; Clark *v.* Union Ferry Co., 35 N. Y. 485; Wilson *v.* Hamilton, 4 Ohio St. 722; Smith *v.* Seward, 3 Pa. St. 342; Cohen *v.* Hume, 1 McC. (S. C.), 439; Littlejohn *v.* Jones, 2 McMull. (S. Car.) L. 365; Cook *v.* Gourdin, 2 Nott. & McC. (S. C.) 19; Sanders *v.* Young, 1 Head (Tenn.) 219; Albright *v.* Penn, 14 Tex. 298. *Compare* Wilson *v.* Hamilton, 4 Ohio St. 122.

4. *Omnibus proprietors* who carry passengers and baggage for hire. Dibble *v.* Brown, 12 Ga. 217; Powell *v.* Myers, 26 Wend. (N. Y.) 591; Clark *v.* Faxton, 21 Wend. (N. Y.) 153; Camden Trans. Co. *v.* Belknap, 21 Wend. (N. Y.) 354; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Jones *v.* Voorhees, 10 Ohio, 145.

5. *Owners of steamboats, ships, vessels, canal boats, and tow-boats,* usually engaged in transporting goods from one place to another. See White *v.* Tug Mary Ann, 6 Cal. 462; Hall *v.* Connecticut River Steamboat Co., 13 Conn. 324; Clark *v.* Richards, 1 Conn. 54; Dunseth *v.* Wade, 3 Ill. (2 Scam.) 285; Flautt *v.* Lashley, 36 La. An. 106; Bussey *v.* Miss. Valley

Trans. Co., 24 La. An. 165; Clapp *v.* Stanton, 20 La. An. 495; Gage *v.* Tirrell, 91 Mass. (9 Allen) 299; Fish *v.* Clark, 49 N. Y. 122; Tuckerman *v.* Brown, 17 Barb. (N. Y.) 191; Garrison *v.* Memphis Ins. Co., 19 How. (N. Y.) Pr. 312; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1; Bowman *v.* Teal, 23 Wend. (N. Y.) 306; s. c., 35 Am. Dec. 562; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; De Mott *v.* Laraway, 14 Wend. (N. Y.) 225; s. c., 28 Am. Dec. 523; Parsons *v.* Hardy, 14 Wend. (N. Y.) 215; s. c., 28 Am. Dec. 521; Arnold *v.* Halenbake, 5 Wend. (N. Y.) 35; Allen *v.* Seawall, 2 Wend. (N. Y.) 327; s. c., 6 Wend. (N. Y.) 335; Wilson *v.* Hamilton, 4 Ohio St. 722; Fuller *v.* Bradley, 25 Pa. St. 120; Peters *v.* Rylands, 20 Pa. St. 497; Humphreys *v.* Reed, 6 Whart. (Pa.) 435; Spencer *v.* Daggett, 2 Vt. 92; Jencks *v.* Coleman, 2 Sumn. C. C. 221. *Compare* White *v.* Tug Mary Ann, 6 Cal. 462; Crosby *v.* Fitch, 12 Conn. 410; Adams *v.* New Orleans Towboat Co., 11 La. 46; Smith *v.* Pierce, 1 La. 349; Ashmore *v.* Pennsylvania Steam & Towboat Co., 28 N. J. L. (4 Dutch.) 180; Aymar *v.* Astor, 6 Cow. (N. Y.) 266; Walston *v.* Myers, 5 Jones (N. C.), L. 174.

6. *Railroad Companies.*—Southwestern R. Co. *v.* Webb, 48 Ala. 585; Fuller *v.* Nantucket R. Co., 21 Conn. 570; Thomas *v.* Boston & P. R. Co., 51 Mass. (10 Metc.) 472; s. c., 43 Am. Dec. 444; Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671; Southern Express Co. *v.* Moon, 39 Miss. 822; Rogers Locomotive Works *v.* Erie R. Co., 20 N. J. Eq. (5 C. E. Gr.) 379; Root *v.* Great Western R. Co., 45 N. Y. 524; Weed *v.* Saratoga & S. R. Co., 19 Wend. (N. Y.) 534; Camden R. Co. *v.* Burke, 13 Wend. (N. Y.) 611; s. c., 28 Am. Dec. 488; Scofield *v.* Lake Shore & M. S. R. Co., 43 Ohio St. 571; s. c., 1 West. Rep. 112; Eagle *v.* White, 6 Whart. (Pa.) 505; Dill *v.* South Carolina R. Co., 7 Rich. (S. C.), L. 158; Jones *v.* Western Vt. R. Co., 27 Vt. 399; Noyes *v.* Rutland & B. R. Co., 27 Vt. 110; Kimball *v.* Rutland & B. R. Co., 26 Vt. 247; Pennewill *v.* Cullen, 5 Harr. (Del.) 238; Lawrenceburgh & U. M. R. Co. *v.* Montgomery, 7 Ind. 474; Thomas *v.* Boston & P. R. Co., 51 Mass. (10 Metc.) 472; Murch *v.* Concord R. Co., 29 N. H. 9; Elkins *v.* Boston & M. R. Co., 23 N. H. 275; Peidmont Manf'g Co. *v.* Columbian R. Co., 19 S. C., 353; s. c., 16 Am. & Eng. R. R. Cas. 194; Crouch *v.* London & N. W. R. Co., 14 C. B. 255; s. c., 23 L. J. C. P. 73; Richards *v.* London, B. & S. C. R. Co., 7 C. B. 839; s. c., 18 L. J. C. P. 251; Pegler *v.* Monmouthshire R. Co., 30 L. J. Ex., 249; s. c., 6 Hurls. & N. 644; Palmer *v.* Grand Junction R. Co., 4 Mees. & W. 749.

This includes, of course, railroads transporting cars of another railroad for hire, although the cars are on their own tracks (Peoria & P. U. R. Co. *v.* Chicago, R. I. & P. R. Co., 109 Ill. 135; s. c., 13 Am. & Eng. R. R. Cas. 506; Vermont & M. R. Co. *v.* Fitchburg R. Co., 96 Mass. (14 Allen) 462; New Jersey R. & T. Co. *v.* Pennsylvania R. Co., 27 N. J. L. (3 Dutch.) 100; Mallory *v.* Tioga R. Co., 39 Barb. (N. Y.) 488). Receivers of a railway operating it under an order of court (Nichols *v.* Smith, 115 Mass. 332; Page *v.* Smith, 99 Mass. 395; Blumenthall *v.* Brainard, 38 Vt. 402). And the trustees of mortgage bonds of a railway who have possession and control of, and actually operate the road. Rogers *v.* Wheeler, 2 Lans. (N. Y.) 486; s. c., affirming 43 N. Y. 598; Sprague *v.* Smith, 29 Vt. 421.

7. *Stage coach lines* which make a practice of carrying for hire parcels which do not belong to the passengers. Merwin *v.* Butler, 17 Conn. 138; McHenry *v.* Philadelphia, W. & B. R. Co., 4 Harr. (Del.) 448; Powell *v.* Mills, 37 Miss. 691; Jones *v.* Voorhees, 10 Ohio, 145; Beckman *v.* Shouse, 5 Rawle (Pa.), 179.

8. *Street railways* under certain circumstances.—Levi *v.* Lynn & B. R. Co., 93 Mass. (11 Allen), 300.

9. *Telephone companies* are common carriers of news in the same sense in which a telegraph company is a common carrier. Hockett *v.* State, 105

Ind. 250; s. c., 55 Am. Rep. 201; Central Union Tel. Co. *v.* State, 110 Ind. 203.

10. *Transportation Companies.*—Mercantile Ins. Co. *v.* Chase, 1 E. D. Smith (N. Y.) 115.

11. *Wagoners* who, upon their own request, carry goods for hire, whether the transportation of goods by their principle and direct business, or an occasional intentional employment. Powers *v.* Davenport, 7 Blackf. (Ind.) 497; Mose *v.* Norris, 4 N. H. 304; Elkins *v.* Boston & M. R. Co., 23 N. H. 275; Gordon *v.* Hutchinson, 1 Watts. & S. (Pa.) 285; McClures *v.* Hammond, 1 Bay (S. C.), L. 99; Moss *v.* Bettis, 4 Heisk. (Tenn.) 661; Craig *v.* Childress, Pick. (Tenn.) 270; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Johnson *v.* Friar, 4 Yerg. (Tenn.) 48; Chevlin *v.* Stratham, 2 Tex. 115. *Compare* Fish *v.* Chapman, 2 Ga. 353; Harrison *v.* Roy, 39 Miss. 396.

See for a full discussion as to who are and who are not common carriers, 2 Am. & Eng. Encycl. of Law, tit. CARRIERS OF GOODS, pages 781 to 787.

WOODWARD

v.

COMMONWEALTH.

(Kentucky Court of Appeals.)

Constitutional Law—Corporations—Citizenship.—A corporation is but a creature of the local law, and has no absolute right to recognition in any of the states, save that in which it is created. The term "citizen" as used in the constitution relates to natural persons only and does not include corporations.

Same—Express Companies—License.—The Kentucky act of March 2, 1860, requiring that foreign express companies shall procure a license before they are entitled to do business within the state, is not in violation of the Federal Constitution, which guarantees that "the citizens of each state shall be entitled to all the immunities of citizens of the several states."

Same—Repeal of Law.—The Kentucky act of March 2, 1860, requiring agents of foreign express companies to take out licenses before transacting business within the state, is not repealed, either expressly or by implication, by Kentucky act of Feb. 20, 1864, which requires all express companies to pay as a tax 6 per cent upon the net profits of the business done each year within the state.

Same—Construction.—The Kentucky act of March 2, 1860, requiring all agents of foreign express companies to procure a license before doing business as such agents, is not affected by the Kentucky act of March 2, 1870, requiring foreign express companies doing business within the state, to pay certain fees each year upon renewing their license.

APPEAL from Circuit Court, Jefferson County.

James Woodward was indicted and convicted, under section 8 Kentucky act March 2, 1860, for having acted as agent of the

Adams Express Co. without having procured any license from the auditor; from which verdict he appealed.

Hallam & Myers for appellant.

Helm & Bruce for appellee.

HOLT, J.—The legislature on March 2, 1860, passed the following act:

"An act to regulate agencies of foreign express companies.

"Section 1. Be it enacted by the general assembly of the commonwealth of Kentucky that it shall not be lawful, after the first day of May, 1860, for any agent of any express company, not incorporated by the laws of this commonwealth, to set up, establish, or carry on the business of transportation in this State, without first obtaining a license from the auditor of public accounts to carry on such business. Statutory provisions.

"Sec. 2. Before the auditor shall issue such license to any agent of any company incorporated by any State of the United States, there shall be filed in his office a copy of the charter of such company, and a statement made, under oath of its president or secretary, showing its assets and liabilities, and distinctly showing the amount of its capital stock, and how the same has been paid, and of what the assets of the company consist, the amount of losses due and unpaid by said company, if any, and all other claims against said company or other indebtedness, due or not due; and such statement shall show that the company is possessed of an actual capital of at least $150,000, either in cash or in safe investment, exclusive of stock notes. Upon the filing of the statement above provided, and furnishing the auditor with satisfactory evidence of such capital, it shall be his duty to issue license to such agent or agents as the company may direct to carry on the business of expressing or transportation in this State.

"Sec. 3. Before the auditor shall issue license to any agent of any express or transportation company incorporated by any foreign government, or any association or partnership acting under the laws of any foreign government, there shall be filed in his office a statement setting forth the act of incorporation, or charter, or the articles of association, or by-laws, under which they act, and setting forth the matters required by the preceding section of this act to be specified; and satisfactory evidence shall be furnished to the auditor that such company has on deposit in the United States, or has invested in the stock of some one or more of the United States, or in some safe dividend paying stocks in the United States, the sum of $150,000, which statement shall be verified by the oath of the president of such com-

pany, its general agent in the United States, or the agent applying for such license; and upon due filing of such statement, and furnishing the auditor with satisfactory evidence of such deposit or investment, it shall be his duty to issue such license to the agent or agents applying for the same.

"Sec. 4. The statements required by the foregoing sections shall be renewed in each year thereafter, either in the months of January or July: and the auditor, on being satisfied that the capital or deposit, consisting of cash securities or investments as provided in this act, remain secure to the amount of $150,000, shall renew such license.

"Sec. 5. Every agent obtaining such license, or renewal thereof, as required by this act, shall, before transacting any business of transportation or expressing in this State, file, in the office of the clerk of the county court in which he or they may desire to do business for said company, a copy of the statement required to be filed with the auditor, and a copy of the license, which shall be carefully preserved by the clerk for public inspection, and, in case of a renewal, shall in like manner file in the office of a clerk of the county court a copy of such renewed statement and license, within thirty days after it shall be filed with the auditor.

"Sec. 6. The statements required by the foregoing sections shall be made up to a period within six months preceding the filing of the same with the auditor.

"Sec. 7. If, at any time after the filing of the statements by this act required, it shall be made to appear to the auditor that the available capital of any such company has been reduced, by misfortune or otherwise, below the sum of $150,000, it shall be his duty to revoke the license or licenses granted to any agent or agents of such company.

"Sec. 8. Any person who shall set up, establish, carry on, or transact any business for any transportation or express company not incorporated by the law of this State, without having obtained license, as by this act required, or who shall in any way violate the provisions of this act, shall be fined for every such offence not less than one hundred nor more than five hundred dollars, at the discretion of a jury, to be recovered as like fines in other cases: provided that it shall and may be lawful for any person who has a right of action that has accrued in this State against such foreign transportation or express company, to sue any such company in any county in this State where its agent may be found: provided further that nothing contained in this act shall be construed to release said company from liability as common carriers.

"Sec. 9. For any license issued by the auditor under this act, and for each renewal thereof, he shall be allowed the sum of

$2.50, to be paid by the agent or company taking out such license.

"Sec. 10. This act shall not apply to any express or transportation company wholly composed of residents of this State, or to any corporation chartered by this State, except to impose the liabilities of a common carrier; nor shall it apply to any person engaged in the ordinary business of transportation as common carrier or otherwise. This act to be in force from its passage." Myer, Supp. 228.

The appellant, James Woodward, was indicted and convicted in the Jefferson circuit court, under the eighth section, for having, during 1886, acted as the agent at Louisville, Ky., of the Adams Express Company, a corporation not created by the laws of this State, without having any license to do so from the auditor.

It is urged, first, that the law is unconstitutional, and therefore void, because it discriminates against non-residents. The Constitution of the United States declares that "the citizens of each State shall be entitled to all the immunities of citizens in the several States." But a corporation is but a creature of the local law. It has no absolute right of recognition in any State, save that of its creation. It has no extra-territorial operation, save by comity. The validity of its action, the exercise of any right whatever by it indeed even the recognition of its existence, in any other State, depend altogether upon its will and consent. One State cannot force its artificial creature into another. If it could, it would thereby transport its laws for the government of another equal State. If the corporation be accorded any rights appertaining to citizenship in another State, it is, by its sanction, either express or implied. It may forbid its presence altogether; and it therefore follows, of course, that it may impose such restrictions as it chooses, provided they are not open to constitutional objection. The "immunities" secured by the organic law, to the citizen of one State, in the other States, are such privileges as are common to the citizens of the latter States under their laws, and do not embrace special privileges created by his local law and enjoyed by him at home. Nor does the term "citizen," as used in the Constitution, include corporations. This is therefore not a case where a State has imposed a burden upon the citizens of another State not borne by its own. This rule has been declared, not only by this court, but also by the supreme court of the United States. Insurance Co. *v.* Com., 5 Bush, 68; Paul *v.* Virginia, 8 Wall. 168; Doyle *v.* Insurance Co., 94 U. S. 535.*

Constitutional law—Corporations as citizens.

* See Butchers Benevolent Assoc. *v.* Crescent City, etc., Co., 83 U. S. (16

It is next said that the act above cited has been repealed, but, even if this be not so, that then its proper construction only requires the company, and not each of its agents, to obtain a license; and that the legislature by subsequent legislation has placed this construction upon it. In support of these positions, we are referred to the following sections of the act of February 20, 1864, entitled, "An act to tax railroads, turnpike roads, and other corporations in aid of the sinking fund:"

Repeal of act—Other statutory provisions.

"Sec. 6. That it shall be the duty of the treasurer, secretary, agent, or superintendent of any express company doing business in this State to report to the auditor of public accounts, on or before the 15th day of July, 1864, and on each succeeding 15th day of July thereafter, a full and comprehensive statement of the business of the company within the State for the twelve months next preceding; and shall, on or before the 10th day of October following, pay into the treasury a tax of six per cent upon the net profits of the business done by it within this State.

"Sec. 7. That if any of the officers mentioned in sections fifth and sixth of this act shall fail or refuse to report to the auditor of public accounts, as therein required, that such officer shall be liable to a fine of one thousand dollars for each month he may so fail to report, which fine or fines shall be recoverable upon motion in the Franklin circuit court; and any execution which may issue upon any judgment rendered on such motion may be levied on the property of any corporation in whose employment such officer may be: provided, however, that, before any such judgment shall be rendered, said officer shall have at least twenty days' notice of the motion.

"Sec. 8. That all laws, or parts of laws, in conflict or incompatible with the provisions of this act are hereby repealed; and no other taxes than those herein imposed, whether provided for in the charters or otherwise, shall be collectible from the several corporations herein enumerated by this Commonwealth." Myer, Supp. 480.

Also to the following amendatory act, approved March 2, 1870:

"An act to amend 'An act to tax railroads and other corporations, in aid of the sinking fund,' approved 20th February, 1864.

"Sec. 1. Be it enacted, by the general assembly of the Commonwealth of Kentucky, that sections six and seven of the act to which this is an amendment, so far as the same applies to foreign express companies doing business in this State, be, and

Wall.) 36, 98; bk. 21, L. ed. 395, 415; U. S. *v.* Anthony, 11 Blatchf. C. C. 204; U. S. *v.* Petersburg Judges of Election, 1 Hughes C. C. 511.

the same are hereby, amended as follows, to wit: All express and transportation and fast-freight line companies doing business in this State and required to obtain a license from the auditor of public accounts, under the provisions of the act entitled 'An act to regulate agencies of foreign express companies,' approved on the 2d day of March, 1860, shall, on renewing their licenses in each year, severally pay, as a tax for the privilege of doing business in this State, the annual sum of five hundred dollars where the distance over which the lines of such company extend in this State is one hundred miles or less, and the annual sum of one thousand dollars where the distance over which the line of such company extends in this State is more than one hundred miles; and any such company which has taken or may take out the license provided for in said act of March 2, 1860, and shall pay the annual tax provided for in this act, shall not be required by the county, town, city, or other corporation or local jurisdiction in this State, to take out or obtain any other or additional license, or to pay any other or additional tax or sum of money for the right or privilege of conducting its business in or through such county, town, city, corporation, or other local jurisdiction: provided, nothing contained in this act shall be construed as exempting said companies from the ordinary ad valorem tax on such property, real or personal, that they may own or possess.

"Sec. 2. That the annual report of the statement of the business of such express companies, required by the said sixth section of the act to which this is an amendment, be, and the same is hereby, dispensed with; and instead thereof it shall be the duty of some one of the representatives of such company enumerated in said section to report, at the time of obtaining the said annual license, a full and true statement of the routes and distances over which the lines of such company extend in this State; and for a failure of such company, or some of its authorized agents, to make such annual report, and to pay the annual tax required by this act, for sixty days after the report and payment ought to be made, such company, in its corporate, joint-stock, or partnership name, shall be liable to a fine of one thousand dollars, in addition to the tax herein imposed, to be recovered, enforced, and collected as required in the seventh section of the act to which this is an amendment.

"Sec. 3. That all laws and parts of laws coming in conflict with this act be, and the same are hereby, repealed; and this act shall take effect from and after its passage." 1 Acts 1869–70, p. 33.

By an act approved February 12, 1866, entitled "An act amending the law regulating the fees to be paid by foreign insurance and express companies," it was provided that the audi-

tor should receive "for each original or renewal license, with certified copy of statement, $5; which fees shall be paid by the agent or agents, or companies, before acting under the license." Myer, Supp. 719. The sixth section of article 4 of the present revenue law only substantially re-enacts the provisions of the act, *supra*, of March 2, 1870, as to the tax to be paid by express companies, the only difference being that it applies to all express companies, and is not confined to foreign ones. It is true it is therein called "a license tax;" but it is for revenue, and was doubtless so termed to distinguish it from the *ad valorem* tax imposed by the act of February 20, 1864, upon the profits of the business.

The above are all the legislative provisions which, in our opinion, have any bearing upon the question of either the repeal or the proper construction of the act of March 2, 1860. It is clear to our minds that they point to two distinct lines of legislation, one looking to the protection of the public in transaction of business with foreign express companies, and the other to the collection of the revenue from companies engaged in this business. Two objects were in view,—one was "to regulate agencies," and the other "to tax" for revenue. The titles of the acts so indicate. The license act of March 2, 1860, was not expressly repealed by the taxing act of February 20, 1864, and statutory repeals by implication are not favored. One act will not be regarded as repealing another by construction, unless their provisions are irreconcilable, or there is good reason to conclude that the legislature so intended. Keeping in view the evident purpose of each of these two acts, we fail to see either any such conflict, or any such legislative purpose. Nor, in our opinion, is the theory that the act of March 2, 1860, was repealed by that of February 20, 1864, supported by the act of March 2, 1870. Upon the contrary, it shows that it was then recognized as being in force. In amending the law as to the tax which express companies were to pay, it expressly, but incidentally, speaks of foreign express companies being "required to obtain a license from the auditor of public accounts, under the provisions of the act entitled 'An act to regulate agencies of foreign express companies,' approved on the second day of March, 1860." This legislative recognition was over six years after the passage of the act which it is claimed repealed the one of 1860; and the act of February, 1866, raising the license fee, was enacted two years after the passage of the so-called repealing act. The two acts of 1860 and 1864 relate to entirely different subjects,—the latter altogether to revenue; while the purpose of the former is to protect the public against dealing with irresponsible companies, and to definitely point out, beyond dispute, the agent of the company

Same—Construction of acts requiring license.

at any place where it may do business. That of 1860 in no way relates to revenue, and the money required to be paid for the license is not exacted as a tax for the government, but merely as compensation to a State officer for the duties he is required to perform under the law. The policy of thus paying him is, to say the least, questionable; but this is not for our consideration. It is a fact of which we must take notice that the State policy in this respect has not been a fixed one. In some instances an officer receives a certain salary, and nothing more; in others, a certain sum, and, by way of making it adequate, also certain fees to be paid to him by those for whom the services are performed. The latter policy has been pursued as to the auditor, whose manifold duties are not only important, but quite onerous. It is within the power of the legislature not only to thus tax for revenue, but to thus provide compensation for the performance of the necessary services. It is done in New York, Ohio, Illinois, Mississippi, and other States. It is urged, however, that, by the imposition of this license fee upon from 250 to 300 express agents, the auditor receives a considerable sum, while the State gets nothing. If the purpose was to raise revenue, this fact would of course be entitled to great consideration, but, as we have already seen, this is not the object. Upon the other hand, however, it would be equally as improbable that the legislature intended that the auditor should perform the responsible duties required by the act of March 2, 1860, for the sum of $2.50 or $5, as now provided, by the issuance of one license to the company. His duties under the law are quite important. He not only issues the license, but he is required to investigate and know the pecuniary condition of the company. He must not only examine critically its statement of its capital, its assets and liabilities, and everything affecting its pecuniary condition, but also the evidence furnished in support of same; and he can issue the licenses only when, in his opinion, the company have conformed to the standard provided by the law. Moreover, it is his duty to watch the condition of the company. If at any time, through misfortune or otherwise, its pecuniary condition falls below the statutory standard, he is required to revoke the licenses that have been issued to its agents. Beyond doubt, all these requirements are for the benefit of the persons and public dealing with the company, and not for revenue. The agent is required to have his license recorded in the county where he is located. This enables the public to know definitely with whom to deal in transacting business with the company, and the granting of the license is a guaranty of its solvency by the State. A statute should, however, be construed according to its equity; and, while it is the province of the legislature to fix the compensation of an officer of the State, yet we may look to it in ar-

riving at their meaning, if it be in doubt. In view, however, of the duties imposed by the law in question upon the auditor, we cannot presume, from the compensation allowed for a license to each agent of the company, that the legislature in fact intended that but one license should issue, and that to the company. Such a construction would be at war, not only with the purpose of the legislation, but the very words of the statute. If language can mean anything, the act of 1860 certainly requires each agent to have a license. It repeatedly says so. The only ground upon which a different construction can be based is that the act of March 2, 1870, in referring to that of 1860, speaks of the company obtaining "a license." The word, however, is used in the singular number in the act of 1860; and this language was doubtless employed in the law of 1870, relating to and amendatory of that taxing the companies, because the ninth section of the law of 1860 provides that the fee for issuing the license shall be paid by the "agent or company." It was reasonable to suppose that the company would furnish its agents their licenses. The construction now asked of the act of 1860 has never been put upon it, although it has now been in force for over a quarter of a century. Neither the executive branch of the government, nor those affected by it, have ever so construed it. This contemporaneous construction—this *communis opinio*—is entitled to weight, and should not be departed from unless clearly required by the law. Such a long-continued practice ripens into an authoritative construction of a statute, especially when the legislature sits by without dictating a change. Moreover, it must not be forgotten that this has continued for over 20 years since the passage of the act, which it is now for the first time claimed repealed the law that authorized it. The agents of the express companies have, during all this time, continued to take out the licenses, and without complaint, so far as this record shows, and certainly without complaint in court. The view above indicated is supported by our legislative policy as to insurance companies. In 1856 the legislature fixed the compensation of the auditor for issuing licenses to insurance agents at $2.50. The law doing so is identical in its provisions with that of 1850 as to express companies. The services required of him in each case were the same. There is a parallel in the legislation. He continued to be thus paid, save that in 1870 the fee was raised to five dollars, until 1880, when this compensation was taken from him, and turned into the treasury; but, in lieu thereof for these services as to insurance companies, he was allowed a fixed salary of $900. During all this time, too, the insurance companies were taxed upon their business. The act of 1860 relates only to the regulation of the agencies of foreign express companies. That of 1864, however, imposes a

6 per cent tax, and relates to all express companies. The amendment of 1870 to the last-named act only changed the basis of taxation as to foreign companies from this per cent to a specific sum. The statements which had to be furnished to the auditor under the acts of 1860 and 1864 were different. One was required to enable him to determine whether the foreign company should be permitted to do business in the State, while the other was for the purpose of fixing the company's tax. The two acts looked to different ends, and were evidently intended by the legislature to subserve different purposes. Every reason requiring the passage of the law of 1860 existed in 1864, when it is claimed that it was repealed. The same public policy which prompted its enactment in 1860 required its continuance in 1864. No reason appears why it should then have been repealed, and the judgment is affirmed.

Corporations—Personality.—Private corporations are legal persons and as such, as a general rule, come within the statutory term "persons" in civil proceedings, where it is not otherwise expressly declared (See South Western R. Co. *v.* Paulk, 24 Ga. 356; Northern Mo. R. Co. *v.* Akers, 4 Kan. 453. See also Baltimore & Ohio R. Co. *v.* Gallahnes Adm'r, 12 Gratt. (Va.) 655), and as such are entitled to the rights and remedies conferred upon "persons" generally by the statute, in those cases where they come within the equities of such statute. See Mineral Paint R. Co. *v.* Keep, 22 Ill. 9; Boyd *v.* Craydon R. Co., 4 Bing. (N. C.) 669; La Forge *v.* Exchange Ins. Co., 23 N. Y. 352; Alcott *v.* Tioga R. Co., 20 N. Y. 210; Field *v.* New York Cent. R. Co., 29 Barb. (N. Y.) 176; Wright *v.* New York Cent. R. Co., 28 Barb. (N. Y.) 80; Mott *v.* Hicks, 1 Cow. (N. Y.) 513; State of Indiana *v.* Woran, 6 Hill (N. Y.), 33; McQueen *v.* Middletown Manuf. R. Co., 16 Johns. (N. Y.) 5; Lehigh Bridge *v.* Lehigh Coal Co., 4 Rawle (Pa.), 9; State *v.* Nashville University, 4 Humph. (Tenn.) 157; Cortes *v.* Kent Waters Co., 7 Barn & Cress. 314.

Same—Residence and Citizenship.—A corporation is said to reside within the jurisdictional territory of its creation, and cannot remove to or do business within another sovereignty, or claim any privileges there except by comity of such other sovereignty, or by actual permission express or implied. Bank of Augusta *v.* Earle, 13 Pet. 586; Paul *v.* the Commonwealth of Virginia, 8 Wall. 168; s. c., 1 With. Am. Corp. Cases, 19; Liverpool Ins. Co. *v.* The Commonwealth of Mass., 10 Wall. 566; s. c., 1 With. Am. Corp. Cases, 60; Hatch *v.* Chi., Rock Island & Pacif. R. Co., 6 Blatchf. C. C. 105; s. c., 1 With. Am. Corp. Cases, 80; Pomeroy *v.* New York & New Haven R. Co., 4 Blatchf. C. C.; 120; Ohio & Miss. R. Co. *v.* Wheeler, 1 Black. 296; Chicago & North Western R. Co. *v.* Whitton, 13 Wall. 270; s. c., 4 Am. Ry. Rep. 462; Christian Union *v.* Yount, 101 U. S. 352; County of Alleghany *v.* Cleveland & Pittsburgh R. Co., 51 Pa. St. 28; Baltimore & Ohio R. Co. *v.* Glenn, 28 Md. 287; Aspinwall *v.* Ohio & Miss. R. Co., 20 Ind. 492; Baltimore & Ohio R. Co. *v.* Cary, 28 Ohio St. 208; s. c., 14 Am. Ry. Rep. 97 (and so as to joint stock companies in New York: Fargo *v.* Louisville, N. & C. R. Co., 6 Fed. Rep. 787; s. c., 1 Am. & Eng. R. R. Cas. 618; O'Brien *v.* Wetherell, 14 Kan. 616. See, *post*, Connor *v.* Vicksburg & M. R. Co.

Same—In Federal Courts.—For the purposes of jurisdiction in the United States Courts a corporation is regarded as a citizen of the state or nation under whose laws it was created, a recent writer has said (see Holt

on Concurrent Jurisdiction, § 90), that "The supreme court upon this subject has established a local fiction. At first it was held that a corporation is analogous to a partnership, and in order to obtain jurisdiction it was necessary that all the members of the corporation should be citizens of the state which created it." The Commercial R. R. Bank of Vicksburg *v.* Slocomb, 39 U. S. (14 Pet.) 60; bk. 10, L. ed. 354; Bank of United States *v.* Deveaux, 9 U. S. (5 Cr.) 61; bk. 3, L. ed. 38; Hope Ins. Co. of Providence *v.* Boardman, 9 U. S. (5 Cr.) 57; bk. 3, L. ed. 36. This view long since, however, became nearly impracticable, and the supreme court modified it by establishing a fiction, that the members of a corporation are presumed by law to be citizens of the state which created the corporation. The statement of the rule by the supreme court is, that a suit by or against a corporation in its corporate name may be presumed to be a suit by or against citizens of the state which created the corporate body, and no averment or denial to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the courts of the United States. Steamship Co. *v.* Tugman, 106 U. S. (16 Otto) 118; bk. 27, L. ed. 87; Muller *v.* Dows, 94 U. S. (4 Otto) 444; bk. 24, L. ed. 207, Ohio & Miss. R. Co. *v.* Wheeler, 66 U. S. (1 Black) 286; bk. 17, L. ed. 130."

Licensure of Express Companies.—See Memphis, etc., R. Co. *v.* Tennessee, etc., R. Co., 13 Am. & Eng. R. R. Cas. 423.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

v.

UNITED STATES.

(127 *U. S.* 406.)

Railroads—Contract for Carrying Mail—Failure to Perform Service—Deduction.—Section 5 of the act of 1879 does not repeal section 3962 of the U. S. Rev. Stats., which gives to the postmaster-general authority to deduct from the pay of contractors, whether they be private persons or corporations, the price of the trip in all cases where the trip is not made, and not to exceed three times the price of the trip, where if the failure be caused by the fault of the contractor or carrier.

Same—Conflicting Statutes—Construction.—Where there are two acts or provisions of law relating to the same subject, effect is to be given to both if that be prescribed.

Same—Repugnancy—Repeal.—If two acts are repugnant, the latter will operate as a repeal to the former to the extent of the repugnancy; but the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others or add new provisions.

THE petitioner, the Chicago, Milwaukee & St. Paul R. Co., is a corporation formed under the laws of Wisconsin, and owns and operates several lines of railway in that State, and in the States of Illinois, Iowa, and Minnesota, and in the Territory of Dakota. In 1879 it entered into sundry contracts with the Post-office Department to transport the mails of the United States

over its lines, on specially designated routes, at rates fixed under the acts of Congress of March 3, 1873, June 12, 1876, and June 17, 1878. The petitioner alleges that it transported the mails upon all the routes designated in accordance with the contracts, except when prevented by the elements or other unavoidable disasters; that between the autumn of 1880 and the spring of 1883, owing to snow-blockades, floods, and other unavoidable causes, which it was impossible for the petitioner to provide against, it was prevented at various times from running its trains of cars over the routes, and consequently the mails were delayed and accumulated until the cars could be got through; but the petitioner did finally carry all the mails over the routes, and as frequently as it was possible; that the Post-office Department deducted from the pay of the petitioner at divers times, during the period mentioned, a large sum of money, claiming a right to do so because of the failure of the petitioner to transport the mails upon the ordinary schedule time for the departure and arrival of the mails, notwithstanding the failures were owing to no want of diligence or care in the petitioner, but were owing wholly to the causes mentioned; and that such deductions amounted to $31,251.86, which sum the petitioner alleges is unjustly and unlawfully held from it, and therefore asks judgment for the amount. A demurrer to this petition, that it did not allege facts sufficient to constitute a cause of action, was interposed by the United States and sustained by the court. Judgment was accordingly entered dismissing the petition, and the petitioner appealed to this court.

J. J. Farnsworth for appellant.

Assistant Attorney-general *Howard* for appellee. Attorney-general was also on the brief.

FIELD, J.—The deductions from the compensation claimed by the railway company for its failure to make the trips required, that is, to render the service stipulated, of which it complains, were made by the postmaster-general under § 3962 of the Revised Statutes, which is as follows:

Provisions of statute.

"The postmaster-general may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier." This section in terms applies to all contractors, and, standing alone, there would not be any serious contention against the authority of the postmaster-general to make the deductions complained of. It is not pretended that the amounts exceeded those mentioned in this section. It is, however, insisted that

the section, so far as applicable to railroad companies, was repealed by § 5 of the act of March 3, 1879, making appropriations for the service of the Post-office Department for the fiscal year ending June 30, 1880, which provides:

"Sec. 5. That the postmaster-general shall deduct from the pay of the railroad companies, for every failure to deliver a mail within its schedule time, not less than one half of the price of the trip, and where the trip is not performed, not less than the price of one trip, and not exceeding, in either case, the price of three trips: Provided, however, That if the failure is caused by a connecting road, then only the connecting road shall be fined. And where such failure is caused by unavoidable casualty, the postmaster-general, in his discretion, may remit the fine. And he may make deductions and impose fines for other delinquencies." 20 Stat. c. 180, 355, 358.

This latter section was repealed on the 11th of June, 1880, (21 Stat. c. 206, 177, 178); and § 12 of the Revised Statutes provides that the repeal of a repealing statute shall not revive the original act. It is, therefore, contended that there was no statute in force which authorized the deductions at the time they were made between the autumn of 1880 and the spring of 1883, during which period the alleged failures in the mail transportation occurred.

There is a brief and conclusive answer to this contention. Section 3962 of the Revised Statutes is not repealed by § 5 of the act of 1879. Section 3962 authorizes a deduction from the pay of contractors, whether they be natural persons or corporations, the price of the trip in all cases were the trip is not performed, and not exceeding three times the price if the failure be caused by the fault of the contractor or carrier. Section 5 of the act of 1879 applies only to railroad companies, and has special reference to failures of delivery within schedule time, and makes a difference between them and failures to make the trips, leaving the provision for the latter substantially as it is in the Revised Statutes. When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeal some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice Story says, it "may be merely affirmative, or cumulative, or auxiliary." Wood v. United States, 16 Pet. 342, 363.

Deduction properly made —Repugnant statutes.

The most that can be said of § 5 of the act of 1879, construed

with reference to § 3962 of the Revised Statutes, is that it makes an exception to the provisions of that section, so far as railway companies are concerned. Its repeal, therefore, leaves the original section in full force. The repeal was before the failures occurred for which the deductions complained of were made.

Judgment affirmed.

Carriage of United States Mail.—See Jacksonville, etc., R. Co. *v.* United States, 28 Am. & Eng. R. R. Cas. 82; Union Pac. R. Co. *v.* United States, 25 Ib. 396, note, 402; notes, 26 Ib. 646, 357; Railroad Co. *v.* United States, 6 Ib. 592; Chicago, etc., R. Co. *v.* United States, 9 Ib. 48; Union Pac. R. Co. *v.* United States, 9 Ib. 51; Chicago, etc., R. Co. *v.* United States, 10 Ib. 616; Chicago, etc., R. Co. *v.* United States, 10 Ib. 621.

GEORGIA RAILROAD AND BANKING CO.

v.

SMITH.

(128 *U. S.* 174.)

Railroads—Regulating Charges—Constitutional Law.—The legislature of a state has power to prescribe the charges of a railroad company for the carriage of passengers and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters subject to the limitation, that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use, without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.

Same—Public Use—Legislative Control.—When an interest or property is affected with a public use, the business in which it is used is subject to public control, for the security of passengers and freight against accident, and for the convenience of the public, and to prevent accident by unreasonable charges, and favoritism by unjust discrimination.

Same—Charter—Contract.—Section 12 of Georgia Act of Dec. 18, 1885, chartering the Georgia Railroad and Banking Co., and giving to it the exclusive right of transportation of persons and property over its railroad, so long as it shall see fit to exercise that right, and the charges of transportation and convenience did not exceed a certain specified rate, is not a contract between the state and the railroad company that the latter might charge whatever it choose within the prescribed limits, and the company is subject to the provisions of a subsequent legislation providing for a commission to regulate railroad tariffs.

Same—Proviso in Statute—Construction.—The general purpose of a proviso is to except the clause covered by it from the general presumption of the statute or from some provision of it, or to disqualify the operation of

the statute in some particular; but it is frequently used as a conjunction to attach an independent sentence or paragraph to the body of the act.

Same—Private Corporations—Obligation of Contract.—A railroad corporation is a private corporation, though its uses are public and a contract embodied in terms in the provision of its charter, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts.

Same—Legislative Control—When Exempt.—In order to exempt a railroad corporation from legislative control, the exemption must appear by such clear and unmistakable language, that it cannot reasonably be construed constitutional with the reservation of the power with the state.

IN Error to the Supreme Court of Georgia.

By an act of the legislature of Georgia, passed December 21, 1833, the plaintiff in error was incorporated under the name of the Georgia R. Co., and empowered to construct a "rail or turnpike road from the city of Augusta," with branches extending to certain towns in the State, and to be carried beyond those places at the discretion of the company. Laws of Georgia, 1833, 256.

By an act of the legislature, passed December 18, 1835, certain amendments to the charter were made, and among others one changing its corporate name to "The Georgia Railroad and Banking Company," its present designation.

The twelfth section of the charter, among other things, declared that "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: provided that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: provided always that the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers." In pursuance of the authority conferred by this section the company, by a deed bearing date on the 7th of May, 1881, leased to one William M. Wadley, for the term of ninety-nine years, "all its privileges, general and exclusive," of transporting persons and property over the lines of railroad owned and controlled by it, to the full extent that it then enjoyed, or was entitled to enjoy,

or might thereafter acquire, subject to the obligations and duties imposed by its charter. With these privileges the company also leased to Wadley, for the same term, all its railroads and their branches, "together with its rights of way, road-beds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks, and other appurtenances." The lessee on his part covenanted to pay the company, as a consideration for the lease, the sum of $600,000 annually, for the full term of ninety-nine years, in two semi-annual payments; also to pay the taxes on the property and franchises; to return the property on the termination of the lease in as good condition as it was at its date; to keep the railroad and its appurtenances and the means of transportation in first-class condition, and to indemnify the company against any damages, losses, or liabilities in the operation of the roads. This lessee has since died, and in the present case his interests were maintained in the court below by his executor.

On the 14th of October, 1879, the legislature of Georgia passed an act entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this State; to prevent unjust discrimination and extortion in the rates charged for transportation of passengers, and freights, and to prohibit railroad companies, corporations, and lessees in this State from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto; and to appoint commissioners, and to prescribe their powers and duties in relation to the same." Laws of Georgia, 1879, 125.

In pursuance of this act a board was constituted, designated the Railroad Commission, composed of three members, originally consisting of James M. Smith, Campbell Wallace, and Samuel Barnett; but to the place of Samuel Barnett the defendant, Leander N. Trammell, has succeded. This commission has prescribed rates for the transportation of freight and persons by railroad companies in the State, which are less than the maximum of rates authorized by the 12th section of the charter of the company. The act imposes a penalty of not less than five thousand dollars for every violation of the rules and regulations thus prescribed. The company and the executor of the lessee accordingly filed their bill, in the case before us, in the superior court of Fulton county, Georgia, against the railroad commissioners and the attorney-general of the State, contending, among other things, that the charter of the company is a contract between it and the State of Georgia, and that by it the company has the right to charge any rates for freight and passengers, not exceeding those limited in the 12th section of its charter, and that the act of October 14, 1879 is in conflict with

the clause of the Constitution of the United States which prohibits a State from passing any act impairing the obligation of a contract. They pray in their bill that the act may be declared null and void, and inoperative against them, and that the commission may be enjoined from prescribing rates of fare and freight over the railroad of the company and its branches, or in any manner enforcing the provisions of the act against them. To this bill the defendants demurred, on the ground that it disclosed no case entitling the complainants to relief in equity, and that they had an adequate and complete remedy at law. The court sustained the demurrer and dismissed the bill. On being taken to the supreme court of the State the decree was affirmed; and to review it the case is brought to this court by the railroad company.

Edward Baxter for plaintiff in error. *Joseph B. Cumming* filed a brief for the same.

Clifford Anderson for defendants in error.

Contention of the company.

FIELD, J.—As appears from the statement of the case, the contention in the court below of the company, the plaintiff in error here, so far as it embraced any federal question, was that the 12th section of its charter constituted a grant of a right to charge the rates therein named; that it built its road and established its business with this grant as a part of its charter; and that such a grant is a contract between it and the State of Georgia, the obligation of which cannot be impaired by its legislation; and this contention is renewed in this court.

Constitutional and statutory provisions.

The constitution of Georgia, adopted in December, 1877, vested in the general assembly of the State, the designation given to its legislature, the power to regulate "railroad freights and passenger tariffs," so as to prevent unjust discriminations and require reasonable and just rates; and made it the duty of that body to pass laws from time to time to accomplish this end, and to prohibit, by adequate penalties, the charging of other than such rates. Art. IV, § 2, Appendix to Code of Georgia, 1882.

Pursuant to this provision of the constitution, the act of October 14, 1879, was passed, providing for the appointment of three railroad commissioners, and authorizing them to prescribe the rates of fare which railroad companies might charge for the carriage of persons and merchandise within the limits of the State. The act does not extend to interstate railroad transportation. Laws of Georgia, 1878–9, 125.

After authorizing the appointment of the three commissioners by the governor, the act declares that any railroad company doing business in the State, after its passage, which shall charge

or receive more than a fair and reasonable toll or compensation for the transportation of passengers or freight of any description, or for the use or transportation of any railroad car upon its track or branches, or upon any railroad which it has the right to use, shall be deemed guilty of extortion, and upon conviction thereof shall be subject to certain penalties prescribed.

The commissioners appointed are required to make reasonable and just rates of freight and passenger tariffs to be observed by all railroad companies doing business in the State on their roads, and to provide for each of the companies a schedule of just and reasonable rates of charges for the transportation of passengers and freight; and the act declares that in suits brought against any of the companies, involving unjust charges or discriminations, such schedule shall be taken in the courts of the State as sufficient evidence that the rates prescribed are just and reasonable.

The commissioners are required from time to time, and as often as circumstances may call for it, to change and revise the schedules, and penalties are prescribed for the enforcement of their regulations.

Decision of State supreme court.

The supreme court of the State held, on an application for an injunction in this case, that this delegation of authority by the legislature to the commissioners, to prescribe what shall be reasonable and just rates for the carriage and transportation of persons and property over railroads within its limits, was a proper exercise of its own power to provide protection to its citizens against unjust rates for such transportation and to prevent unjust discriminations; and that it was expected, not that the legislature would itself make specific regulations as to what should in each case be a proper charge, but that it would simply provide the means by which such rates should be ascertained and enforced.

Power of legislature to regulate rates.

It has been adjudged by this court in numerous instances that the legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce. Stone *v.* Farmers' Loan and Trust Co., 116 U. S. 307, 325, 331; s. c., 23 Am. & Eng. R. R. Cas. 577; Dow *v.* Beidelman, 125 U. S. 680; s. c., 34 Am. & Eng. R. R. Cas. 322. The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes

of its creation, or as Chief-justice Marshal expresses it, by which "the character and properties of individuality" are bestowed "on a collective and changing body of men," Providence Bank *v.* Billings, 4 Pet. 514, 562; the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the State's right of eminent domain that it may appropriate needed property,—a right which can be exercised only for public purposes; and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discriminations. This is not a new doctrine but an old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn *v.* Illinois, 94 U. S. 113, 126, 139, 146; but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression. In almost every case which has been before this court, where the power of the State to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction has been under consideration, the question discussed has not been the original power of the State over subject, but whether that power had not been, by stipulations of the charter, or other legislation, amounting to a contract, surrendered to the company, or been in some manner qualified. It is only upon the latter point that there have been differences of opinion.

Contract contained in plaintiff's charter.

The question then arises whether there is in the 12th section of the charter of the plaintiff in error a contract that it may make any charges within the limits there designated. The first clause would seem to have been framed upon the theory, which obtained very generally at the date of the charter, that a railroad was subject, like an ordinary wagon road, to the use of all persons who were able to place the necessary conveyances upon it. It was then generally

supposed that while the company constructing the road was the owner of the roadbed, any one could run cars upon it upon payment of established tolls and following the regulations prescribed for the management of trains; and some charters granted at that period contained schedules of charges for such use. But this notion has long since been abandoned as impracticable. Lake Superior and Mississippi Railroad Co. *v.* United States, 93 U. S. 442, 446–449. The section grants to the company the exclusive right of transportation of persons and merchandise over its road, a right which in another part of the act is limited to thirty-six years, and then expires unless renewed by the legislature upon such terms as may be prescribed by law and accepted by the company. This period has long since expired, and we are not informed that any renewal of the privilege has been made.

The difficulty attending the construction of the clause following this one arises from the doubt attached to the meaning of the term "provided." The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.

Same—Meaning of term "provided."

It does not matter, in the present case, whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied, as to any future action of the legislature. If the exclusive right remain undisturbed, there can be no just ground

of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated.

No exemption from legislative interference.

It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges, which the company may make for its services in the transportation of persons and property, shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State. There is no such language in the present case. The contention of the plaintiff in error therefore fails, and the judgment must be affirmed.

Charter Restrictions Against Regulation of Rates.—See Dow *v.* Beidelman, 34 Am. & Eng. R. R. Cas. 322; Stone *v.* Farmers' Loan & T. Co., 23 Ib. 577; Merrill *v.* Boston & L. R. Co., 21 Ib. 48, note. 50.

Constitutional Law—Power of Legislature to Regulate Charges.—General statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation when not forbidden by charter are not open to the objection that they deprive the corporation owning the property or railroad within the state of its property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States; neither do they take away from the corporation the equal protection of the laws. Stone *ex rel.* Railroad Commissioners *v.* Farmers' Loan & Trust Co., 116 U. S. 307; bk. 29, L. ed. 636; Spring Valley Water Works *v.* Schotter, 110 U. S. 347; bk. 28, L. ed. 173; Richmond F. & P. R. Co. *v.* Richmond, 96 U. S. (6 Otto) 521, 529; bk. 24, L. ed. 734; Munn *v.* Illinois (Granger Cases), 94 U. S. (4 Otto) 134, 135; bk. 24, L. ed. 77. This right in the state legislature to regulate freight and passenger charges is restricted only by some contract in the charter, or by the act that what is done amounts to a regulation of foreign or interstate commerce. See Stone *ex rel.* Railroad Commissioners *v.* Farmers' Loan & Trust Co., 116 U. S. 307; bk. 29, L. ed. 636; Washington & G. R. Co. *v.* District of Columbia, 108 U. S. 522, 526; bk. 27, L. ed. 807; Chicago, B. & Q. R. Co. *v.* Cutts, 94 U. S. (4 Otto) 155, 164, 180; bk. 24, L. ed. 94; Baltimore & O. R. Co. *v.* Maryland, 88 U. S. (21 Wall.) 456; bk. 22, L. ed. 678.

AVINGER

v.

SOUTH CAROLINA R. CO.

(*South Carolina Supreme Court, September* 28, 1888.)

Common Carriers—Carriers of Goods—Duty to Carry.—A railroad is a common carrier, and, as such, is bound to carry for all persons all goods offered for transportation by any person whatever. Following *Ex parte* Benson, 18 S. C. 42, 43, and approving Johnson *v.* Railroad Co., 16 Fla. 623.

Same—Rates for Carrying—Discrimination.—In the absence of Statutory or charter regulations to the contrary, a railroad or other common carrier may discriminate as to rates, provided no unreasonable charge is made; but no discrimination can be made in the right to ship. Following *Ex parte* Benson, 18 S. C. 42, 43.

Same—Who Are—Question for Jury.—The question as to whether a party in any given case is a common carrier is one of fact, and consequently for the jury.

Same—Railroads—Branch Roads.—Wherever a railroad company is by its charter invested with power to construct branches to its main track, and when this is done for the purpose of general transportation, the road will become, under its charter, a common carrier as to such branches, and subject to the law governing carriers; but the question whether such branch has been used for general transportation, so as to make the company liable as a common carrier as to such branch, is one of fact for the jury.

Same—Operating Road—Instructions.—An instruction that if a defendant railroad company maintained and operated a branch road, or ran its own engine and cars upon it, whether under its charter it had a right to construct such branch road or not, it will become a common carrier thereon with all the liabilities to the public which attend the main lines, is erroneous.

Same—Refusal to Carry—Instructions.—An instruction that if a defendant railroad, after a refusal to carry freight for the plaintiff had carried for another person freight that was received and discharged at a private platform, plaintiff cannot recover, is properly refused, because it assumes that the position of common carrier has not been established, and this is a question of fact which is for the jury.

Same—Exemplary Damages.—A railroad is liable for punitive or vindictive damages for refusal to carry goods only in case of ill will or malicious and wilful disregard of the rights of another.

APPEAL from Common Pleas Circuit Court of Berkeley County.

Action by Thomas J. Avinger against the South Carolina R. Co. The complaint was as follows: "First. That at the times hereinafter mentioned the defendant was and now is a railroad corporation, created by and under the laws of the State of

South Carolina. Second. That at the times hereafter mentioned the defendant, as such railroad corporation, was a common carrier for hire under the laws of the State of South Carolina between the city of Charleston, county of Charleston, State aforesaid, and Lamb's Station, in the county of Berkeley, State aforesaid, and as such common carrier for hire operated the railroad between said points. Third. That from the 22d day of December, 1884, to the 1st day of June, 1885, the defendants unlawfully and wrongfully refused and continued to refuse to receive, carry, and deliver the property of plaintiff for hire between the said city of Charleston and Lamb's Station aforesaid, although the said defendant was then and during said period receiving, carrying, and delivering for hire, as such common carriers, the property of other persons between the said city of Charleston and the said Lamb's Station. Fourth. That the defendant wrongfully and unlawfully, between the 22d day of December, 1884, and the 1st day of June, 1885, discriminated against the plaintiff in their business and vocation of common carriers aforesaid, in their operation of the railroad between the city of Charleston and Lamb's Station aforesaid, and therein wrongfully and unlawfully refused, and continued to refuse, to furnish to this plaintiff, without discrimination, the same facilities for the carrying, receiving, delivery, storage, and handling of the property of the plaintiff as by them, the defendant, furnished for all other property of like character carried by the defendant between the said city of Charleston and said Lamb's Station. Fifth. That by reason of the premises the plaintiff has been injured to his damage two thousand dollars. Wherefore the plaintiff demands judgment against the defendant for the sum of two thousand dollars damages and costs of this action." To this complaint the defendants answered as follows: "The defendant above named, answering the complaint herein, by Brawley & Barnwell, its attorneys, admits the first allegation thereof, and denies each and every other allegation in said complaint contained. (2) For further defence the defendant says the railroad track from Ten-Mile Hill, on its main line, to a point known as 'Lamb's,' on the lands of the Charleston, S. Car., Mining and Manufacturing Company, was constructed at the special request of the last-named company, and exclusively for its benefit, to enable said company, which was engaged in the mining of phosphate rock, to ship the same by rail, and said company furnishing the right of way over its land without charge, and contributing to the expense of building said track. That when the same was constructed it was not expected that said track should be used by the defendant in its capacity of common carrier, and no provision was made for depot facilities at said terminus at Lamb's, and no conveyance of right of way

was executed. That some time after said track was constructed it was found that, by extending the same to the Ashley river, through the lands of the said mining company, a general business in the transportation of freight and passengers could be built up, and the same was done with the consent of said mining company; and the defendant received and carried all freight that was offered, and, among others, freight for the plaintiff, Avinger, up to about the 15th day of January last. About that time it received notice from the mining company, forbidding it to land freight upon its lands; the said company alleging that it was injurious to its mining interest to permit strangers to make a thoroughfare of its lands lying about the station at Lamb's. That thereupon negotiations were had between the defendant company and the mining company, wherein the defendant company endeavored to assert and procure the right to use said track for all purposes necessary in its business as a common carrier, which negotiations were carried on for some time, pending which this company gave public notice that it would no longer receive and carry any freight to Lamb's. The result of such negotiations was the refusal of said mining company to grant a conveyance of a right of way for such purposes, and this defendant was advised by counsel that it had not acquired in the premises such right as would enable it, without consent of such mining company, to land freight at Lamb's for other parties than said mining company. And although this defendant believed, and still believes, that it is legal and within its rights to transport freight for the said mining company exclusively over the said track, yet, in view of the litigation threatened by said plaintiff, and the expense and annoyance incident thereto, it has been led to forgo the exercise of such right, and the benefit to be derived therefrom, and since about the 1st day of June last it has refused to transport any freight whatsoever from Charleston to Lamb's, including in such refusal the freight of the said mining company. Wherefore the defendant demands that said complaint be dismissed, and its costs." Judgment for plaintiff, and defendant appeals. The first exception is that the court erred in charging the jury that "a railway company is bound to carry for all persons all goods offered for transportation by any person whatever for a suitable hire." The fifth and sixth exceptions are that the court erred in refusing the following requests for charge: "That if the jury find from the evidence that the railroad company carried freight from Charleston to Lamb's from the time it refused to carry for Avinger until 1st June, 1885, for the mining company alone, and that the freight for the mining company was delivered on a private platform of the mining company, then the railroad had a right to refuse to carry Avinger's freight there, and he cannot

recover;" and "that punitive or vindictive damages cannot be recovered under the evidence in this case, but the damages must be the direct result of the refusal to carry, or discrimination proved."

Brawley & Barnwell for appellant.

Bryan & Bryan for respondent.

SIMPSON, C.J.—The character of this action and of the defence will be seen from the complaint and answer, copies of which are herewith given. At the close of plaintiff's testimony the defendant moved for a nonsuit, which was refused, his honor saying that "it is by no means clear what are the rights of the railroad company over the land of the land-owners over which this branch runs. It might be that, under the statute, they had no right to condemn that land. The difficulty with me is that, if the railroad is there at all, is it not there under the organic law of its being, and, if there, is it not forever estopped from saying that it has exceeded its charter powers? I am inclined to think that, without holding themselves out as common carriers at all, they were common carriers to Lamb's; otherwise they had no right to be there. They ceased to be a corporation at Lamb's. I must therefore refuse the motion for nonsuit." The case then proceeded, when, at the conclusion of the testimony, several requests to charge, both from the plaintiff and defendant, having been made, his honor charged as follows: "Gentlemen of the Jury: After hearing the testimony and argument in this case, and what I had to say to the counsel in the case, upon the motion for nonsuit, it is not necessary that I should say very much to you. If it were not for these requests to charge, I would give you very briefly my view of the whole case, and let you take the record. But I must dispose of these requests to charge. The first thing that a jury has to do is to determine what the issue presented to them is. The charge here is not that the defendant refused to carry goods here for the plaintiff, but that it refused to carry goods for the plaintiff when it carried goods for others; that the defendant refused to carry goods on the same terms for the plaintiff that it carried goods for others; that it discriminated against him; that that was in violation of law, and for that he is entitled to recover damages. I have no right to tell you that a single fact has been proved in this case. I cannot tell you which of the witnesses to believe, or what facts they have proved. All the facts are for you under the instructions. I will now pass upon these requests. The first proposition on behalf of the plaintiff is: (1) 'The jury are instructed that a common carrier or a public carrier, that is, a railroad company, is bound to carry for all

Refusal of nonsuit.

Instructions to the jury.

persons all goods offered for transportation by any person whomsoever, for a suitable hire, and that this is the result of the public employment of the railroad company as a carrier, and for failure to receive, carry, and deliver goods so offered they are liable to an action for damages; that, as against a common or public carrier, every person has the same right, and that, in all cases where this common duty controls, the defendant company cannot accommodate the mining company and refuse the plaintiff.' By substituting 'one person' in place of 'the mining company,' I charge you that that is a correct proposition of law. (2) 'The jury are further instructed that if they find that the South Carolina R. Co. refused to carry the plaintiff's goods over their road, or any part or branch thereof, while they were carrying the goods of any other person or persons or corporation, and discriminated against the plaintiff, then the plaintiff, for such discrimination, is entitled to recover the damages thereby sustained by the plaintiff.' That, I think, is good law. (3) 'And the jury are further instructed that the road of the South Carolina R. Co. includes all the road in use by said company, whether owned or operated under a contract or lease by the South Carolina R. Co.; and if the jury find from the evidence that the road from Charleston to Lamb's Station was during the times of discrimination complained of in use by the South Carolina R. Co. then they are thereon responsible for discrimination and damages therefrom as for any other part of their road.' I think that is correct. (4) 'And the jury are further instructed that if they find from the evidence that the defendant, the South Carolina R. Co., operated by steam the railroad between Charleston and Lamb's, and that the defendant company was doing business as a public or common carrier on such road, then the defendant would be liable for all acts of discrimination against the plaintiff.' I think that is correct. (5) 'And the jury are further instructed that in this case it makes no difference by whom this railroad was laid out and constructed; and if the jury find that the defendant company was maintaining and operating said road, then the defendant company would be liable to the plaintiff for any damages proven from all acts of discrimination against the plaintiff, and refusing to carry the goods of the plaintiff on the same terms, when it carried the goods of another.' I will add to this: 'If it did so carry the goods of another.' I think the proposition is correct. Propositions 6, 7, and 8, I cannot charge.'* (9) 'The jury are in-

* Mr. Bryan, for the plaintiff, withdrew the sixth, seventh, and eighth requests. By the Court: "I was going to refuse these requests because I don't think they had the right to condemn that land for that road. If they did that, they could condemn land anywhere, and build their roads anywhere, independent of their charter.

structed that if they find the discriminations and damages to plaintiff as alleged, the time admitted by the defendant in its answer, during which they carried goods for persons other than plaintiff to Lamb's Station, was from 15th January, 1885, to 1st June, 1885, and the damages of the plaintiff within that time would be the amount plaintiff would be entitled to recover in such case.' I don't know that I can charge you that, for the reason that I think it requires me to charge you upon a question of fact. It is true that the answer admits that certain things were done between January and June, and you may find the discrimination; but I don't think I have the right to charge you on that fact. I am requested by counsel for the defendant to charge you as follows: (1) 'That if the jury find from the evidence that the railroad company carried freight from Charleston to Lamb's, from the time it refused to carry for Avinger until 1st June, 1885, for the mining company alone, and that the freight for the mining company was delivered on a private platform of the mining company, then the railroad had a right to refuse to carry Avinger's freight there, and he cannot recover.' I cannot charge you that proposition. I think the law is this: When the defendant constructs a branch of its road, and operates it with its own engines, cars, and employees, even though it may be such a branch as it had no right to construct without the consent of the owners of the land through which it passes, such branch road is operated under all the liabilities to the public which attach to the main lines. If the company carries passengers at all, it must carry all alike. If it carries freight for one, it must carry freight for all, on the same terms. If the company has any legal existence at all as to such a branch, it must have the liabilities of a common and public carrier. Such a liability is as much a part of its existence as the power to make contracts, or to do any other acts. Any other construction of the law would put the whole commerce of the country under the absolute control of the railroads. In the view I take of this case, therefore, it is not material whether the defendant had a right to condemn the right of way and of sites for depots, or not. As to the public, the company is estopped from saying that it has exceeded its charter powers. I cannot, therefore, charge you that that first proposition is good law. (2) 'That the action is at common law, and no penalties under any statute can be recovered.' That is correct. They are confined to actual damages, unless this is a case for exemplary damages.' (3) 'That punitive or vindictive damages cannot be recovered under the evidence in this case, but the damages must be the direct result of the refusal to carry, or discriminations proved.' The rule is this: Wherever an act is done by a defendant, and he is sued for it, and the jury think that he has been trying hon-

estly to carry out his rights without interfering with the rights of others, maliciously, wilfully, or otherwise, then the jury should confine themselves to actual damages. But whenever there has been any ill will or wilful disregard of the rights of another, then the jury is at liberty, in a case like this, to give exemplary damages. In any event, the damages must be within the amount claimed, viz., $2000."

Upon an examination of the testimony reported in the "case" we have found that there was enough offered to carry the case to the jury, and therefore there was no error in overruling the motion for nonsuit. Nor was there error on the point raised in the first exception. While it is true that at common law, and in the absence of charter or statutory regulations to the contrary, a common carrier may discriminate as to rates, so that no unreasonable charge is made, yet he must carry for all; because it is a leading principle of the common law, applicable to all common carriers, that they are bound to carry for all, and for a reasonable remuneration. In Johnson *v.* Railroad Co., 16 Fla. 623, the following language was used, which succinctly embodies the common-law doctrine on this subject, to wit: "That, as against a common or public carrier, every person has the same right; that in all cases, when his common duty controls, he cannot refuse A, and accommodate B.; that all—the entire public—have the right to the carriage for a reasonable price—at a reasonable charge for the services performed; and the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is that, for services performed, he shall charge no more than a reasonable sum to him." This principle was recognized and enforced in our case of *Ex parte* Benson, 18 S. C. 42, 43. See also the cases cited therein. The argument of appellant's counsel on the above exception seems to have been directed entirely to the point that there might be discrimination as to rates of transportation, as laid down above; but the charge of his honor assailed in the first exception did not conflict with this principle. The judge said nothing as to rates. His remarks were confined to persons, and he ruled that a railroad was bound to carry for all, making no discrimination as to the right to ship. In this, as we have said, there was no error. 1 Chit. Cont. (11th Ed.) 682 *et seq.;* 2 Kent Comm. 597–611; *Ex parte* Benson, *supra.*

Discrimination—Carrier must carry for all.

The second exception assigns error because his honor charged "that the road of the South Carolina R. Co. includes the road in use by said company, whether owned or operated under a contract or lease by the South Carolina R. Co.; and if the jury find from the evidence that the road from Charleston to Lamb's

Station was, during the times of discrimination complained of, in use by the South Carolina R. Co., then they are thereon responsible for discrimination, and damages therefor, as for any other part of their road." The main question below was whether the defendant was a common carrier as to the branch to Lamb's. If it was, then the common-law doctrine as to liability of common carriers, as announced above, applied to the case. But the preliminary and vital question involved was whether the defendant was a common carrier on said branch. This, it seems to us, was a question of fact, and consequently a question for the jury. What constitutes a common carrier, and how and when one can become such carrier, are questions of law as applied to the facts found, as also his responsibility. There can be no doubt that a railroad company, organized and chartered for the transportation of goods, merchandise, and other property, is a common carrier, and would be so independent of any declaration to that effect in its charter; such being the very purpose of its creation. But its character of common carrier can extend only to the road which it may be incorporated to construct, or which it may operate by virtue of its charter. No doubt the defendant, under its charter, and the acts referred to by respondent's attorney, has been invested with power to construct branches to its main track; and wherever this may be done for the purpose of transportation, it will become, under said charter, a common carrier as to such branches, subject to the law governing carriers. So, too, it has authority to operate other roads by contract or lease, for transportation purposes; and whenever it may do so it becomes a common carrier upon such roads. But when a question arises whether or not it has become a common carrier as to such branch or road, this must depend upon the testimony bearing upon the fact; whether the alleged branch has been constructed, or the alleged road operated, for the purposes suggested, and not simply whether it has been used, or is "in the use" of said company, for any purpose. Suppose, for instance, that the defendant owned a body of timber land some miles from its main track, and that for its own purposes in procuring cross-ties, stringers, and other lumber for repairs it should construct a track to said lands, using its engines and cars thereon for the transportation of said lumber to the main track, and for no other purpose, could it be claimed that the company would become a common carrier thereon, and be bound to receive and transport all freight that might be offered? We think not. The question in such cases must turn on the object and purpose of the branch constructed, and the road operated; and this is a question of fact, dependent, not simply, as we have said, upon the use, but upon the character of the use. We think, therefore,

Whether defendant was common carrier on branch lines.

that his honor was in error when he charged the jury "that if they found from the evidence that the road from Charleston to Lamb's Station was, during the times of discrimination complained of, in use by the South Carolina R. Co., then they are thereon responsible for discrimination, and damages therefor, as for any other part of their road." So, too, we think his honor enlarged the test of becoming a carrier too much in the propositions excepted to in the third and fourth exceptions, in which he ruled that, if defendant maintained and operated said road, or ran its own engine and cars upon it, whether under its charter it had the right to construct it or not, it would become a common carrier thereon, "with all the liabilities to the public which attend the main lines." True, these general propositions were accompanied with the statement that, if goods were carried for one, they must be carried for all, and, if passengers were carried at all, all alike must be carried,—which latter statements were correct, provided the position of carrier had once been established; but the propositions of law likely to mislead the jury preceded these statements, where his honor charged that maintaining and operating the road, running its engine and cars upon it, made the defendant a common carrier thereon, without regard to the purpose and object of thus maintaining and operating it. Upon the facts of this case the jury may have been warranted in finding the defendant a common carrier to Lamb's Station. Of this, however, we intimate no opinion; we only decide that his honor's charge was erroneous, in enlarging too far the facts to be considered by the jury as determining the question whether the defendant had become a common carrier to said station; or, rather, in holding as matter of law that the facts mentioned, if found by the jury, would establish the position of a common carrier in the defendant. There was no error in refusing defendant's requests as found in exceptions 5 and 6. Both of these requests involve the holding, on the part of the judge, of the fact that the position of a common carrier had not been established against the defendant, which, as we understand the case, was a question entirely for the jury, dependent upon the force and effect of the testimony. And we may add that, as to the sixth exception, in regard to punitive or vindictive damages, the rule laid down by his honor was unobjectionable. It is the judgment of this court that the judgment of the circuit court be reversed.

McIVER and McGOWAN, JJ., concur in the result.

Common Carriers—Who Are.—As to common carriers, see "Full Discretion." *ante.* Schloss *v.* Wood, 492, and note, 495-498.

Same—Duty of Carrier.—It is the duty of common carriers to receive for carriage, according to their reasonable rules and regulations, and in accordance with their regular time-cards, all freights and persons, upon

the proper payment of their charges, subject to the responsibility incident to such employment. See Marriam *v.* Hartford & M. H. R. Co., 20 Conn. 254; Coger *v.* Northwestern Union Packet Co., 37 Iowa 145; s. c., 8 Am. Ry. Rep. 101; Cheney *v.* Boston & Me. R. Co., 11 Met. (Ky.) 121; New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188; Jordan *v.* Fall River R. Co., 59 Mass. (5 Cush.) 69; Rogers Locomotive Works *v.* Erie R. Co., 20 N. J. Eq. (5 C. E. Gr.) 379; Messenger *v.* Pennsylvania R. Co., 37 N. J. L. (8 Vr.) 531; Union Locomotive Co. *v.* Erie R. Co., 37 N. J. L. (8 Vr.) 23; Messenger *v.* Pennsylvania R. Co., 36 N. J. L. (7 Vr.) 307; West Chester & Philadelphia R. Co. *v.* Miles, 55 Pa. St. 209; Beekman *v.* Saratoga & Schenectady R. Co., 3 Paige Ch. (N. Y.) 45; s. c., 2 Am. R. Cas. 503; Kuter *v.* Mich. Cent. R. Co., 1 Biss. C. C. 35; s. c., 10 West. L. J. 416; Sinking Fund Cases, 99 U. S. (9 Otto) 719; bk. 25, L. ed. 504; New Jersey Steam Nav. Co. *v.* Merchants' Bk., 47 U. S. (6 How.) 344, bk. 12, L. ed. 465.

Same—Refusal to Carry.—Where a railroad company or other common carrier wrongfully refuses to carry persons or freight offered, they are liable in damages. See Marriam *v.* Hartford R. Co., 20 Conn. 354; Jordan *v.* Fall River R. Co., 59 Mass. (5 Cush.) 69; Hamel *v.* Owens, 1 Dev. & B. (N. C.) 273; Anon. *v.* Jackson, 1 Hayw. (N. C.) 14; McDuffee *v.* Portland R. Co., 52 N. H. 430; s. c., 3 Am. & Eng. R. R. Cas. 602; Fish *v.* Clark, 2 Lans. (N. Y.) 176; Hollister *v.* Howlan, 19 Wend. (N. Y.) 334; Cole *v.* Goodwin, 19 Wend. (N. Y.) 261; East Tenn. R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 271; Messenger *v.* Pennsylvania R. Co., 37 N. J. L. (8 Vr.) 531; s. c. 18 Am. Rep. 754; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 47 U. S. (6 How.) 344; bk. 12, L. ed. 465; Morton *v.* Tibbetts, 15 Ad. & E. 428; Garton *v.* Bristol & E. R. Co., 1 B. & S. 112; s. c., 30 L. J. Q. B. 273; Crouch *v.* London & N. W. R. Co., 14 C. B. 255; s. c., 23 L. J. C. P. 73; Crouch *v.* Great N. R. Co., 11 Exch. 742; s. c., 34 Eng. L. J. 573; Lane *v.* Cotton, 12 Mod. 472.

To this rule, however, there are exceptions. See Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Lake Shore & M. S. R. Co. *v.* Perkins, 25 Mich. 329; Johnson *v.* Midland R. Co., 4 Exch. 371; s. c., 18 L. J. Exch. 366; McMannus *v* Lancashire & R. Co., 4 H. & N. 327.

Same—Preference—Discrimination.—At common law the rule is that carriers shall not exercise any unjust discrimination in rates of toll. They are held to do exact and even-handed justice to everybody doing business with them. Schofield *v.* Lake Shore & M. S. R. Co., 43 Ohio St. 571. See, *post*, Allen *v.* Cape Fear & Y. V. R. Co., 532, and note, 536.

It has been held, however, that discriminations are allowable in freight, if fair and reasonable, and founded on grounds consistent with public interest. Chicago & A. R. Co. *v.* People, 67 Ill. 11; Fitchburg R. Co. *v.* Gage, 78 Mass. (12 Gray) 393; Schofield *v.* Lake Shore & M. S. R. Co., 40 Ohio St. 571; Hersh *v.* North. R. Co., 74 Pa. St. 181.

It is said in McKnee *v.* Missouri Pac. R. Co., Mo. App. ; s. c., 4 W. Rep. 875, that to charge one a rate less than the regular fixed rate is not discrimination. To charge one a higher rate than the lowest rate given, or any one less under certain circumstances, is discrimination. See Steward *v.* Lehigh V. R. Co., 38 N. J. L. (9 Vr.) 505.

Same—Agreement to Rebate.—It has been held not to be a discrimination in rates of transportation, as between shippers, for a railroad company to agree to make a rebate to the shipper of a certain per cent of the fares according to his shipments, the rate of transportation itself agreed upon being the regular and legally authorized rate. See Toledo, W. & W. R. Co. *v.* Elliott, 76 Ill. 67; Steward *v.* Lehigh V. R. Co., 38 N. J. L. (9 Vr.) 505; s. c., 4 Am. Ry. Rep. 54. However, an agreement not to allow the same rebate drawback of fares to any other person is against

public policy, and therefore void. Steward *v.* Lehigh V. R. Co., 76 Ill. 67.

For a full discussion of the duty of common carriers to receive for transportation all goods, and their liability for failure to do so, see 2 Am. & Eng. Encycl. of L. 788 *et seq.*, tit. Carriers of Goods; and see Louisville, etc., R. Co. *v.* Flannagan, 32 Am. & Eng. R. R. Cas. 532; note, 538; Central R. & B. Co. *v.* Logan, 30 Ib. 63; note, 66.

KELLOGG

v.

SUFFOLK AND CAROLINA R. CO.

(*North Carolina Supreme Court, February* 21, 1888.)

Freight—Refusal to Carry—Statutory Duty—"Regular Station."—A place at which there has never been any station agent, where no tickets are kept or sold, where there is no agent's office, and where no bills of lading or receipts are given, but where the conductors sometimes stopped trains and took on freight and passengers is not a "regular depot or station" within the meaning of the provision of the North Carolina Code, which imposes a penalty upon any company refusing to receive freight at any "regular depot, station, wharf," etc.

APPEAL from Superior Court, Gates County.

Action to recover a statutory penalty for refusal to carry freight. Plaintiff appeals from a judgment for the defendant. The opinion states the case.

Pruden & Vann for plaintiff.

L. L. Smith for defendant.

DAVIS, J.—This was a civil action originally commenced before a justice of the peace for the county of Gates, to recover a penalty of $50 for refusing to receive freight, under section 1964 of the Code, and carried by appeal to the superior court of said county and tried before Avery, J., at spring term 1887, of said court. The evidence was, in substance, that during the latter part of November, 1886, the plaintiff carried two mattresses and put them on the platform of a building standing at a place on the line of defendant company's road, called "Meara's Station," about one mile from Sunsbury, a regular station, and gave the usual signal to an approaching train to stop. It did not stop, but the engineer "shook his head and went on." After the train had passed, at the request of the plaintiff, Mr. Meara, who lived one fourth of a mile distant,

Facts.

and who was not an agent of defendant company, procured some tools and a lock which he put on one door to the building, and nailed up the other (there were two doors to the building,—one of them was off the hinges, and to the other there was no lock), and then "put away" the plaintiff's mattresses for him. On the next morning the train stopped, and they were shipped to Suffolk. Freight had been "taken off and on," and it was not uncommon to see the train stop at that point during trucking season. There was never any station agent there; no tickets were kept or sold there; no agent's office and no books were kept there, or bills of lading or receipts given. The conductor stopped the train, and took on freight and passengers. The plaintiff testified that he had heard the conductor say, about 10 days before he brought the mattresses to ship, that he did not intend to stop at Meara's again. Meara testified that he had known freight to be shipped from there 20 times since the house was built there two years previous, and had known freight to be delivered on three or four occasions, and had never known of a refusal to stop the train before, when the usual signal was given. The issue was: "Did the defendant company refuse to receive freight when tendered by the plaintiff at a regular station on its line of road, to be forwarded as directed by the plaintiff?" The court instructed the jury that upon the testimony there was no view in which the plaintiff could recover; that there was no view of the testimony in which the jury could find, in reference to the issue submitted, that Meara was a regular station on the defendant company's road. There was a verdict and judgment for the defendant, from which the plaintiff appealed.

Meaning of regular station.

Section 1964 of the Code, under which this action was brought, declares that agents and other officers of railroads and transportation companies, whose duty it is to receive freight, shall receive all articles of the nature and kind received by such company for transportation, whenever tendered at a regular depot, station, wharf, or boat-landing, and shall forward the same by the route selected by the person tendering the freight, under existing laws; and the transportation company represented by any person refusing to receive such freight shall be liable to a penalty of $50, and each article refused shall constitute a separate offence. Section 1963 prescribes the rules of transportation, and requires railroad companies, among other things, to provide for the transportation of such property as shall, within a reasonable time previous thereto, be offered for transportation, etc. Section 1967 makes it unlawful to permit articles received for shipment to remain unshipped for more than five days, etc. We can see no error in the ruling of his honor. Meara's was no "regular depot or sta-

tion" within the meaning of the statute. There was no agent of the company there, charged with the duty of receiving property for transportation, and the engineer or conductor on the train could not be, as disclosed by the evidence, such receiving and forwarding agent as is contemplated by section 1964.

There were several other questions presented by the record, which we need not consider, as the evidence, all of which was offered by the plaintiff, fails to present any state of facts that would entitle him to recover. There is no error.

Common Carrier—Failure to Transport Goods.—In the case of Skellie *v.* Central Railroad and Banking Co. (Ga.), 6 S. E. Rep. 811, it was held that in an action against a railroad company for failure to transport certain melons within the required time, plaintiff offered to prove that his vendors agreed to sell him the melons only on condition that C. & Co. would accept plaintiff's drafts; that C. & Co. agreed to accept said drafts only on condition that said melons be placed on the Gate City, at Savannah, for transportation; that these facts were communicated to defendant's agent, and he assured plaintiff that the melons would be put on the Gate City in time; that upon these assurances the trade between plaintiff and his vendors was closed. *Held* that, the evidence being offered as a whole, and that part of it relating to the manner of purchasing the melons being inadmissible, the whole was properly rejected. *Held* also, that in an action against a railroad company for failure to deliver certain melons within the required time, plaintiff's offer to prove that at the time the bill of lading of the melons was delivered by defendant, with the consent of defendant's agent, a draft was drawn upon the bill of lading in favor of plaintiff's vendors, and the bill of lading and draft turned over to such vendors, the agent knowing that such vendors were the owners of the draft and bill of lading, is properly rejected as irrelevant.

Same—Pleading.—In an action against a railroad company for failure to deliver certain melons within the required time, it appeared that such failure caused the melons to miss the vessel by which they were to have been delivered to the consignees, and that thereupon plaintiff consented to a change of destination, whereby sustained loss. Plaintiff moved to amend his declaration so as to avoid what he conceived to be the consequences of his consent to the change of destination. *Held* that, while plaintiff had a right to amend, as the motion was made under a misapprehension, such consent not barring plaintiff's right of recovery, and as the amendment, if allowed, would have amended him out of court, its refusal was not error. Skellie *v.* Central Railroad and Banking Co. (Ga.), 6 S. E. Rep. 811.

Refusal to Carry.—See, *ante*, Avinger *v.* South Carolina, etc., R. Co., 519, and note, 527–529.

ALLEN

v.

CAPE FEAR AND YADKIN VALLEY R. CO.

(*North Carolina Supreme Court, April* 9, 1888.)

Common Carriers—Discrimination—Action for—Pleading.—An action against a railroad company for discriminating unjustly against a plaintiff by directing its agents to refuse to receive or transport any goods offered for transportation by the plaintiff, except when prepaid, does not state a cause of action if it fails to aver that the agents of the company actually have refused to receive or transport his goods, and that he has actually been injured.

Same—Slander and Libel—What Constitutes Libel—Published Order to Servants.—Written direction by a railroad company to its agents, instructing them not to receive or ship for a designated person any articles or merchandise of any description, except when the freight charges therefor are prepaid, and a request to a connecting line receiving freight therefrom to make a similar order, is a privileged communication, and does not constitute libel, in the absence of express malice.

APPEAL from Superior Court, Cumberland County.

Action by plaintiff, J. L. Allen, against defendant, the Cape Fear & Yadkin Valley R. Co., for unjust discrimination and libel in publishing an order not to carry plaintiff's freight except when the freight charges are paid. Plaintiff appeals from judgment of dismissal on the pleadings.

W. A. Guthrie, N. W. Ray, and *T. H. Sutton* for appellant.

D. Rose and *G. M. Rose* for appellee.

SMITH, C.J.—The plaintiff sued out a summons against the defendant company on May 14, 1884, and, upon the return of service, set out his cause of action in the following complaint filed: "(1) The above-named plaintiff, complaining, says that the above-named defendant, the Cape Fear & Yadkin Valley R. Co., is, and was at the time hereinafter mentioned and referred to, a corporation duly created and existing under and by virtue of the laws of North Carolina, and, as such, was acting as a common carrier in the transportation of passengers and freight to and from the town of Fayetteville, in said county of Cumberland, and exercising and enjoying all the rights, powers, and privileges appertaining to railway corporations as common carriers and warehousemen. (2) That the defendant, James S. Morrison, was, at the time hereinafter mentioned and referred to, in the employment of said corporation defendant as engineer and superintendent of said

Facts—Pleading.

railway. (3) That the plaintiff, J. L. Allen, at the time hereinafter mentioned and referred to, was engaged in business in said town of Fayetteville as a merchant and dealer in furniture and other merchandise, and also as a manufacturer of furniture, and sash, blinds, doors, and other building material. (4) That, as such merchant, dealer, and manufacturer, the plaintiff was a patron of said railway, and was accustomed to use the same in the transportation of goods and materials to his said place of business and manufactory, and also in the shipping of furniture, goods, sash, blinds, etc., from his store and factory in said town of Fayetteville, using the said road as merchants, dealers, and shippers of all kinds were and are accustomed to do. (5) That on or about the 6th of May, 1884, the defendant James S. Morrison caused to be issued from his office an order as follows, viz.: "MAY 6, 1884. *To Agents:* From this date you are instructed to ship no lumber or merchandise of any description to Mr. J. L. Allen, of Fayetteville, N. Car., except when all freight and charges are paid. J. S. MORRISON, Engineer and Superintendent,"—and caused the same to be sent to all the agents on the line of said railway, and also requested Maj. Winder, who is the superintendent of the Raleigh & Augusta Air Line R., to give the same instructions to agents on his road. The said Raleigh & Augusta Air Line R. was at that time the only railroad that connected with the Cape Fear & Yadkin Valley R., and delivered freight to, or received freight from, the Cape Fear & Yadkin Valley R. (6) That said Cape Fear & Yadkin Valley R. Co. was accustomed to receive and transport goods, merchandise, and freight of all kinds, for all shippers, without requiring prepayment of freight and charges, and up to said May 6, 1884, the plaintiff had been treated as all other customers in that respect; but the aforesaid order was a discrimination against the plaintiff specially, and was not made to apply to the other customers or patrons of said corporation generally. (7) That the said corporation defendant, upon its attention being called specially to said order by the plaintiff, refused to change or modify it, and said corporation has enforced said order against the plaintiff. (8) That the issuing and enforcement of said order by said J. S. Morrison and by the Cape Fear & Yadkin Valley R. Co., as plaintiff is advised and believes, was wrongful and unlawful. (9) That by reason of the aforesaid order, wrongfully and unlawfully issued by said J. S. Morrison, and wrongfully and unlawfully carried out and enforced and published against the plaintiff by said J. S. Morrison, chief engineer and superintendent, and by said Cape Fear & Yadkin Valley R. Co., the plaintiff has been greatly damaged and injured in his aforesaid business, and in his financial standing and credit as a merchant, dealer, and manufacturer, viz., in the sum of ten

thousand dollars. Whereupon the plaintiff demands judgment against said Cape Fear & Yadkin Valley R. Co., and said James S. Morrison for the sum of ten thousand dollars, and for the costs of this action.

"BROADFOOT, RAY AND GUTHRIE, Attorneys for Plaintiff.

"J. L. Allen, the above-named plaintiff, being sworn, says that the foregoing complaint is true, except as to matters therein stated as upon information and belief, and as to these matters he believes it to be true.

"J. L. ALLEN.

"Sworn and subscribed before me, August 14, 1884.

"T. S. LUTTERLOH, C. S. C."

The defendants put in their answer, in which they admit the material facts set out in the complaint, and among them the issue of the order to the agents of the company to require payment of all the goods consigned to the plaintiff; and this they justify on the ground of his repeated refusals and delay in paying freight bills when presented, and the inconvenience and embarrassment resulting therefrom, and his disregard of the notice given of the intended action of the company. On defendant's motion to dismiss the action, the following judgment was rendered: "This cause coming on to be heard upon the complaint and answer, and after argument, it is now, on motion of defendant's counsel, as upon a demurrer *ore tenus*, that the complaint does not state facts sufficient to constitute a cause of action, ordered and adjudged that this action be dismissed, and that the defendant recover judgment against plaintiff for costs, to be taxed by the clerk. Walter Clark, judge presiding." From this ruling and the judgment consequent on it the plaintiff appeals.

Discrimination—Necessary averments in complaint.

In examining the complaint, it will be seen that it does not show that the company, or any of its agents, ever in fact refused to receive or transport any goods offered for transportation to the plaintiff, or that any inconvenience, expense, or delay has been incurred by reason of the issue of the order, or that it has been acted on and enforced to the plaintiff's detriment or damage. The gravamen of the complaint is that the order itself is personal, and discriminates between him and other persons who may wish to use the road for transportation purposes, in requiring of him an advance payment, when goods are sent, which is not required in the case of others; and the allegation is that this is not allowable, because the company is a public corporation and a common carrier. Still the fact remains, or at least the contrary is not averred, that the order is still without practical results of which the plaintiff can complain, and until it is put in force it is

no more than a declaration of the intention, and not a cause of action.

In the argument before us it is insisted, and such seems to have been the object in view in framing the complaint, that the order is a libellous publication, hurtful to the plaintiff's credit as a business man who has frequent occasion to use the road, and implies, at least, a charge of impaired credit, if not an approaching insolvency. If this be a reasonable inference from the terms of the order, it should have been charged in direct terms that such was its meaning, so that upon the face of the complaint it could be determined whether a cause of action is set out, or it would be exposed to a demurrer. But assuming this obstacle to be out of the way, the alleged libellous matter consists merely in a direction given by the company to its subordinates for the regulation of their conduct, and a request given to the superintendent of a connecting road which interchanges freight with the defendant company, and seems to be clearly, unless malicious (and malice is not imputed), a privileged communication, proper in itself, and essential to the harmonious working of the road. In Wakefield *v.* Smithwick, 4 Jones (N. Car.), 327, Pearson, J., thus lays down the law upon this subject: "The defence under the doctrine of privileged communication is much broader, and much more favorable to the defendant [referring to a plea of justification]; for, if he succeeds in proving such a relation between himself and the person to whom the communication is made as authorizes him to make it, the burden is upon the plaintiff to prove that it was not made *bona fide*, in consequence of such relation, but out of malice, and that the existence of such relation was used as a mere cover for his malignant designs. When, however, the plaintiff shows that the matter communicated was false, the question of *bona fides* becomes an open one, and the defendant is called on for some explanation to meet the inference arising from the fact that he has communicated false information." The plaintiff, a trader, employed an auctioneer to sell off his goods, and otherwise conducted himself in such a way that his creditors reasonably concluded that he had committed an act of bankruptcy. One of them sent the auctioneer a notice not to pay over the proceeds of sale to the plaintiff, saying, "he having committed an act of bankruptcy." This was held to be a privileged communication as being made in the honest defence of defendant's own interest. Odger, Sland. & Lib. 226, citing Blackham *v.* Pugh, 2 C. B. 611, 15 Law J. C. P. 290. Again it may be asked wherein consists the alleged libellous matter? The order, assuming it to have been issued in the interest of the company, real or supposed, to withdraw from the plaintiff a privilege which hitherto

Libellous publication—Privileged communication.

he had enjoyed in common with other patrons of the road, is but the exercise of a right to demand of every one that upon all freight conveyed the charges must be paid in advance; and we do not perceive any legal wrong done to one to whom credit may not be given, because it is given to others, it may be, because of their punctuality in paying bills whenever they are presented. The statute recognized the right, for it compells the company to furnish transportation, not generally, but "on the due payment of the freight or fare legally authorized therefor" (Code, § 1963); and therefore the exaction of prepayment of freight for goods consigned to the plaintiff is but the assertion of a right which might be, if in fact it be not, enforced against all dealers. The complaint is fatally defective in failing to set out facts necessary to constitute a cause of action against the defendant, and departs most widely from any of the approved forms in use in civil suits for libellous publications.

We concur, then, in the opinion of the court, and affirm the judgment dismissing the action.

Carrier of Goods—Discrimination—Pleading.—In the case of Goodridge *v.* Union Pac. R. Co., 35 Fed. Rep. 35, the U. S. Circuit Court for the District of Colorado, in an action where the complaint against a railroad to recover for unjust discrimination, irrespective of the penalty imposed by Laws Colo. 1885, c. 273, § 9, p. 310, averred that plaintiff paid one dollar per ton; that the company charged a corporation, naming it, only 60 cents per ton, and that "such charge to plaintiff for such transportation services were and are unjust, unreasonable, and extortionate." *Held*, on demurrer, that the complaint was good, it not being incumbent on plaintiff to show what was a reasonable charge. *Held*, also, that in Colorado the common-law count for money had and received is good on demurrer to complaint in an action against a railroad company to recover for unjust discrimination in freight charges.

As to discriminations, see *ante*, Avinger *v.* South Carolina R. Co., 519, and note, 527-529.

Same—Action for Penalty—Limitation.—The Laws of Colorado, 1885, c. 273, § 9, p. 310, authorizing the person injured by unjust discrimination in the matter of freight charges, etc., on the part of a railroad company in that State, to recover a penalty in the amount of three times the actual damages, is a penal statute; and an action under that section to recover such penalty for an unreasonable exaction of freight is barred in one year, under Gen. St. Colo. 1883, § 2170, providing that "all actions for any penalty . . . brought by . . . any person to whom the penalty is given, . . . shall be commenced within one year next after the offence is committed." Goodridge *v.* Union Pac. R. Co., 35 Fed. Rep. 35.

A complaint against a railroad company under Laws Colo. 1885, c. 273, § 9, p. 310, to recover the penalty denounced thereby for an unjust exaction of freight, alleged that the company posted its schedule, and that plaintiff, believing that that schedule was uniform for all persons, paid the rate charged therein; but that, as a matter of fact, the company took freight from another person 40 cents a ton less than what plaintiff paid. *Held*, on demurrer, that no concealment by the company was shown, and that the action was barred under Gen. St. Colo. § 2170, within one year

from the time the offence was committed, and not within one year from the time the discrimination was discovered.

Same—Prohibition—Jurisdiction of Railway Commissioners.—In East & West India Dock Co. *v.* Shaw, Savill & Albiob Co., L. R. 39 Ch. Div. 224, it is said that the provisions of the Railway and Canal Traffic Act, 1854, sec. 2, that railway (and canal) companies shall provide all reasonable facilities for receiving, forwarding, and delivering traffic, and that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever"—are limited to the conveyance and transport of traffic on a railway (or canal), and do not give jurisdiction to the Railway Commissioners, on complaint under the Regulation of Railways Act, 1873 (36 and 37 Vict. c. 48, § 6), to restrain a company owning two separate docks twenty miles apart, and a line of railway connected with one of such docks (and thereby constituted a railway company within the Railway Companies' Amendment Act, 1867), from charging preferential dock dues to the prejudice of one ship-owner using the docks, not connected with the line of railway, in favor of other ship-owners. In this case the court discuss and explain West *v.* London & N. W. R. Co., 5 C. P. 622.

Libel—Privileged Communications by Railroad Companies.—See Payne *v.* Western R. Co., 18 Am. & Eng. R. R. Cas. 119; Bacon *v.* Michigan Cent. R. Co., 20 Ib. 633, note, 637; Bacon *v.* Mich. Cent. R. Co., 31 Ib. 357, note, 363.

LANCASHIRE AND YORKSHIRE R. CO.

v.

GREENWOOD AND SONS.

(*L. R.* 21 *Q. B. Div.* 215.)

Carriage of Goods—Action for Charges—Defence of Unreasonableness—Counter-claim—Railway and Canal Traffic Act.—It is no defence to an action by a railway company to recover charges for the carriage of goods that the charges sued for are unreasonable, so as to give an undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, within the meaning of § 2 of the English Railway and Canal Traffic Act, 1854.

Same—Over-payments—Counter-claim and Set-off.—The defendant in such an action cannot set off, or recover by counter-claim, over-payments in respect of previous charges which were unreasonable within that section.

ACTION to recover money alleged to be due from the defendants for the carriage of their goods on the plaintiffs' railway.

The defence which was relied upon at the trial before Cave, J., at Liverpool, without a jury, was that the charges sought to be recovered, and certain other similar charges, which had previ-

ously been paid by the defendants to the plaintiffs, were unreasonable, so as to subject the defendants to undue prejudice or disadvantage, within the meaning of § 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and the defendants claimed a set-off, and also counter-claimed, in respect of the alleged over-payments on previous occasions.

The material facts sufficiently appear from the judgment.

Littler, Q.C., Bigham, Q.C., and *J. B. Edge* for plaintiffs.

R. Henn Collins, Q.C., and *C. A. Russell* for defendants.

CAVE, J.—This is an action to recover the sum of 247*l.* 16*s.* 7*d.*, for the carriage of the defendants' goods by the plaintiffs, and was tried before me on the northern circuit.

Agreement by defendants to pay rates.

At the hearing two points were raised. The first was whether there was such an agreement by the defendants to pay the rates claimed by the plaintiffs as to deprive them of the right to say that they have been charged too much. Now with reference to that point I have read the letters which were relied upon by Mr. Littler, and I find nothing in them to justify me in coming to the conclusion that the defendants have deprived themselves of the right of objecting to the rates as being too high. They amount to nothing more than an inquiry as to what the plaintiffs' rates were. The defendants did not bind themselves to send any goods. It was merely a question, "What are your rates for carrying goods to such and such places?" Answer, "At the present moment they are so and so. How long they are going to be so we do not undertake to say." That was all, and that clearly to my mind does not by itself deprive the defendants, if they can make out their case, of the right to say that the charges were excessive by reason of their being unequal, or on any other ground arising out of the plaintiffs' acts in carrying for other people upon other terms.

Unreasonable charges—Set-off and counterclaim.

The second question was this. The defendants allege that the charges made against them were unreasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), § 2, and they seek to reduce the charges upon that ground. They also seek to set off previous payments made by them for the carriage of other goods, which they contend were over-payments because the charges were unreasonable within the same section; and inasmuch as they claim a return larger than is sufficient to cover the whole of the plaintiffs' claim, they have also made a counter-claim, in which they claim these excess payments so far as they exceed the sum necessary to cover the plaintiffs' claim in the action. The contention on the part of the plaintiffs is that this defence cannot be set up, and, on the same grounds, that neither

the set-off nor the counter-claim can be maintained. If the defence cannot be set up, it is obvious that the set-off and counter-claim cannot be maintained. In order to settle that question it is necessary to look at one or two clauses of the Railway and Canal Traffic Act of 1854. The 2d section provides that every railway company shall afford reasonable facilities for receiving and delivering traffic, and so on, and that no company "shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Grievance under Railway Clauses Consolidation Act.

Now before that act was passed, in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), § 90, there was a provision requiring that the company should charge equal rates, but that had been construed by the courts to mean equal rates for the carriage of goods over the same portions of the line, so that, if there was a charge from A. to B., which was equal to all persons sending goods from A. to B., no objection could be raised to that under § 90 of the Railways Clauses Consolidation Act, but if a particular person, X., was charged so much for the carriage of his goods from A. to B., and another person, Y., was charged less, then there was an inequality within the meaning of § 90 of the Railways Causes Consolidation Act, which entitled the person aggrieved to maintain an action for the amount which had been overcharged to him. Where, however, the places over which the goods were carried were not the same, as for instance where there was a charge of so much from A. to B., and of so much from B to C., then, although the charges might be the same, while the distances were only half in the one case what they were in the other, yet that was not an inequality within § 90 of the Railways Clauses Consolidation Act.

Remedies of Railway and Canal Traffic Act—Proceedings thereunder.

In order to meet this grievance the Railway and Canal Traffic Act, 1854, was passed, and by § 2 of that Act it is open to any person to complain that he is subjected to undue or unreasonable prejudice or disadvantage by reason of the charge for carriage from A. to B. being excessive as compared with what is charged for carriage from B. to C. That complaint was one which before then he could not have made, but under the Railway and Canal Traffic Act, 1854, he is enabled to go before the court to make that complaint. Obviously the considerations would be of a somewhat intricate nature. It would be necessary to inquire what were the reasons why more was charged for one distance than was charged for another distance, or why proportionately

more was charged for one distance than was charged for another, and that would depend upon a great many considerations, arising out of the nature of the traffic, the peculiar facilities, the competition which might be developed, and a great many other matters which quite obviously were unfit to be tried before a jury, and therefore the legislature thought fit, when passing the Railway and Canal Traffic Act of 1854, to add § 6, which is in these terms: "No proceeding shall be taken for any violation or contravention of the above enactment, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law." That latter part preserved the rights which the parties had, and, amongst other rights, that under § 90 of the Railways Clauses Act, which, however, does not apply to this case.

The manner provided in the Railway and Canal Traffic Act, 1854, was by application to the court of common pleas by motion or summons, and peculiar powers were given to the court to enable them to deal with the complaint when it arose, and to arrive at a just estimate as to whether there was or was not any grievance to which the complainant had been subjected.* As I have said, it was a matter which was necessarily complicated, and very unfit, indeed, to be tried by a common jury, to whom the consideration that the charge from A. to B. was larger in proportion to the mileage than the charge from B. to C. presented almost irresistible attractions.

Setting up counter-claim.

Now, it is quite clear that under that section no action could be brought, because the section says distinctly that no proceedings shall be taken, and Mr. Henn Collins, who argued this case on behalf of the defendants, admitted that if no action could be brought it would be very difficult to say that a counter-claim could be maintained, or even that a set-off could be set up. But he contended that to use this act by way of defence was not taking any proceedings for its violation, and consequently was not forbidden by § 6. I think that one must look at the scope and purpose of the act in order to put the correct interpretation upon § 6, and it appears to me that the object of the legislature here was that this very difficult question, whether there had or had not been an undue preference or an unreasonable disadvantage, was not intended to be left to be fought out before a jury, but was intended to be decided by the special tribunal thereby appointed, and by that tribunal only. If that was the real intention of the

* This jurisdiction is transferred to the Railway Commissioners by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), § 6.

legislature, it seems quite obvious that to raise this question by way of defence would be equally mischievous with raising it by way of an action, and consequently it appears to me that I must construe the statute in such a way as to meet what I think was the mischief at which it was pointed.

There is a case of Denaby Main Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., 11 App. Cas. 97; s. c., 26 Am. & Eng. R. R. Cas. 293, in which the lord chancellor thought it might well be that no action would lie expressly for a breach of the second section of the act, but that it was a matter for consideration, which he would prefer to reserve for a future opportunity, whether if a railway company committed a breach of that section, and in committing that breach extorted money for carriage, to which by law they were not entitled, the ordinary remedies at law for extortion were not available. 11 App. Cas. at p. 112. I do not understand the lord chancellor in that passage to mean that a person whose goods have been carried by a railway company can by an action for extortion raise for the decision of a jury the question whether there has been a breach of the second section, but I understand him to mean, that what he desires to reserve for future consideration is, whether, after the decision of the special tribunal that there has been a breach of the second section, an action would not lie for extortion founded on the breach established in that way. In such an action there would be no contest whether there had been a breach or not, because that would have been established by the means provided by the act, and the action would simply be to recover the moneys which by the decision of the special tribunal had been shown to have been extorted by the railway company; and it is obvious that an action of that sort would be perfectly free from the objection which I have pointed out, because it would be no longer open to the jury to consider whether there had or had not been a breach of the second section. They would be bound to accept the decision of the special tribunal, and the only matter which would remain would be a simple matter of calculation, upon the basis of the decision of the special tribunal, how much had been the excess which had been charged to the plaintiff, and which he had been compelled to pay.

Same—Denaby Colliery Co. v. Manchester, etc., R. Co.

When that question arises it will have to be considered and determined, but, as far as my judgment goes, it does not arise in this case, because I think there is a clearly manifested intention of the legislature, that the question whether there has or has not been a breach of the second section is to be tried, not before a jury, but before the special tribunal constituted in the way mentioned in the act, and having the special powers of inquiring and determining which are given to it by the act. With

regard to this second point my decision must be in favor of the plaintiffs.

Judgment for the plaintiffs.

Action for Discrimination under English Railway and Canal Act, 1854.—See Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 26 Am. & Eng. R. R. Cas. 293; Same *v.* Same, 18 Ib. 482.

BOARD OF RAILROAD COMMISSIONERS OF OREGON

v.

OREGON RAILWAY AND NAVIGATION CO.

(*Supreme Court of Oregon, November* 5, 1888.)

Railroad Companies—Railroad Commissioners—Powers—Extension.—A power conferred by the legislature upon a board of commissioners, required to be exercised with reference to the affairs of certain corporations, will not be extended by implication; and the acts which the board attempts to do under the power will not be upheld, unless the authority to do them is affirmatively shown to be included in it.

Same—Regulating Charges—Jurisdiction.—Where the legislative assembly of the State passed an act creating a board of railroad commissioners, empowering it to examine into the affairs of railroad corporations doing business within the State, and required it to make a biennial report, with such suggestions "as to what changes in the classification of freights, or what change in the rate of freights or fares are advisable for the public welfare," but conferred no express authority upon the board to regulate the price of freight, or to determine when freight charges were unreasonable, *held*, that the board had no jurisdiction to require a railroad company to refund to a shipper a sum of money alleged to have been exacted from him in excess of a reasonable charge for the shipment.

Same—Report to Legislature—Power to Hear Complaints—Adjusting Differences.—*Held*, that where such act directed the board to examine into such affairs, and specially required it to report the result of its investigation concerning certain specific matters to the legislature, evidently for the purpose of its action thereon, it would not be presumed that the act intended to give the board authority to adjust these matters, although it was empowered by certain provisions therein contained to hear complaints made by persons against railroad companies on account of acts in general done or omitted to be done by them.

Same—Overcharge—Remission of Charges—Suit by Commissioners.—And *held*, further, that a provision in the act to the effect that whenever any railroad company violated, refused, or neglected to obey any lawful order or requirement of the board, it shall be the duty of the commission to enter complaint in the circuit court of the State, sitting in equity, and that such court should have power upon notice to the company to proceed to hear and determine the matter speedily, etc., did not authorize such a proceeding in order to enforce the repayment of money charged on

freight claimed to be in excess of a reasonable charge; that a claim of that character can only be enforced by a common-law action.

APPEAL from Circuit Court, Umatilla County.

Action by the board of railroad commissioners of the State of Oregon against the Oregon Railway & Navigation Co. to compel the return of a sum of money due a third person. Judgment for plaintiff, and defendant appeals.

THAYER, C.J.—The respondent herein instituted a proceeding in said court, against the appellant to require it to refund to one E. J. Summerville the sum of $11, claimed to be an excess over and above a reasonable compensation exacted by the appellant from said Summerville for transporting for him a car-load of wheat from Pendleton to Portland. The respondent was created by an act of the legislative assembly of the State entitled "An act to create and establish a board of railroad commissioners, and to define and regulate its powers and duties, and to fix the compensation of its members," approved February 18, 1887. The appellant is a railroad corporation organized under the laws of the State, and maintains a line of railroad between the points mentioned and at other places within the State. The proceeding was taken under the said act; and the main question presented for the consideration of this court is whether it authorizes such board to maintain a proceeding to obtain relief of the character claimed therein.

Case stated.

I suppose it has become the settled doctrine that the legislature has authority to establish reasonable regulations for the control in certain particulars of all corporations whose business is of a *quasi* public character; and that to enable it to exercise such authority prudently and intelligently it may provide for an inspection of the affairs of the corporations which concern the general community. This authority arises out of the principle that such institutions enjoy privileges and franchises created for the benefit of the public, and is exercised in order that the public may not fail to receive it. Such regulations must not be arbitary or capricious. Their aim and object must be to promote the welfare of society; otherwise they cannot be enforced. The legislature has the right to judge as to when the public necessity requires the adoption of such measures, but the courts may determine whether a particular regulation is a reasonable exercise of the power. It is difficult to ascertain from an examination of said act what power the legislature conferred upon the said board. Counsel for the appellant claims that no power whatever has been conferred upon it, except to find out as to the freights and fares chaaged by common carriers, and certain other facts, and report the same

Legislative regulations generally.

Power conferred upon board—Provisions of act.

to the legislature. Section 9 of the act provides that "said board may inquire into, ascertain, and report to itself the method by which the accounts of corporations operating railroads or street railways are kept." Section 10 provides that "the board shall make a biennial report to the legislative assembly including such statements, facts, and explanations as will disclose the actual workings of the system of railroad transportation of freight and passengers, and its bearing on the business prosperity, etc., with such suggestions in relation thereto, etc., as to them may seem appropriate. They shall also at such times as they shall deem advisable examine any particular subject connected with the condition and management of railroads, and report to the legislative assembly their doings thereon, and their reasons therefor." Section 11 provides that "said commissioners shall examine into the condition and management of all other matters concerning the business of the railroads of this State so far as the same affect or relate to the interests of the public and to the accommodation and security of passengers or persons doing business therewith, and whether such railroad companies or corporations, their officers, etc., comply with the laws of this State now in force or which shall thereafter be in force concerning them, and such other matters as they shall deem important; and for such purpose said commissioners shall have the right to examine all the books, etc., of any railroad company or corporation in this State; and they shall have power to examine under oath, etc., any and all directors, etc., or any such railroad corporation, and any other person, concerning any matter relating to the condition and management of the business of such corporation or company." Section 12 provides that "any person, etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable grounds for investigating said complaint, it shall be the duty of the commission to investigate the matter complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 13 provides that "whenever an investigation shall be made by said commission it shall be its duty to make a report in writing in respect thereto, which shall include the finding of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such finding so made shall thereafter in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found. All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of." Section 14 provides that "if in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, etc., that anything has been done or omitted to be done in violation of the provisions of this act or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation or to make reparation for the injuries so found to have been done, or both, within a reasonable time to be specified by the commission; and if within the time specified it shall be made to appear to the commission that such common carrier has ceased from such violation of the law and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law." Section 15 provides that "whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to enter complaint in the circuit court of the State, sitting in equity, in the judicial district in which the violation or disobedience of such order or requirement shall arise, alleging such injury; and the said court shall have power to hear and determine the matter at any time after service of the complaint, in the usual way, on such short notice to the common carrier complained of as the court shall deem reasonable; and said court shall proceed to hear

and determine the matter speedily, in such manner as to do justice in the premises, and on such hearing the report of said commission shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to such court on such hearing that the lawful order or requirement of said commission, exercised in pursuance of the provisions of this act, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be enforced by proper process issued out of said court." Section 17 of said act provides to the effect that whenever the commissioners deem that repairs are necessary upon any railroad, or an addition to or change of its stations or station-houses, or change in its rates of fares for transporting freight or passengers, or in the mode of operating its road and conducting its business, they shall in writing inform the corporations of the improvements or changes which they consider proper, and a report of the proceedings of compliance or of a refusal to comply with such suggestions shall be included in their biennial report to the legislative assembly. Section 18 of the act requires the board to investigate the cause of any accident on any railroad resulting in loss of life, and invests it with discretionary power to investigate any accident on such road. Section 19 requires every railroad company or corporation on request to furnish said board any information required by it concerning the condition, management, and operation of the road or business of such company or corporation. Section 20 of said act provides that the board may prescribe the form of the annual statement required to be transmitted to the secretary of State by every company or corporation owning or operating a railroad in this State provided for by act of the legislative assembly of the State of Oregon approved February 26, 1885, and empowers the board to make changes and additions to such form, and requires it to examine such statements when filed, and if the same be defective or appear erroneous to notify the corporation to correct it. Section 22 of said act provides that in case any railroad company or corporation refuses to submit its books, etc., to the examination of the board, or to furnish information provided for in that act, or fails, neglects, or refuses to do or perform any of the requirements of the act, it shall forfeit and pay to the State of Oregon for every such offence a sum of not less than $100 nor more than $500, to be recovered in an action in the name of the State of Oregon against such company or corporation. And section 23 of the act empowers the board to enter the cars,

depots, stations, and other places of business of such corporations, for the purpose of inspecting the same, and to observe the manner and methods in which the business of such corporation is done. These sections of the act contain, so far as I am able to discover, all the provisions bearing upon the question submitted; and it must be ascertained from them whether the proceeding can be maintained or not. The main object of the act was to ascertain the condition of railroad affairs in the State, and the manner in which they are being conducted. Sections 9, 10, and 11 thereof clearly indicate that such was its purpose. Said sections endow the board of commissioners created by the act with ample power to investigate the subject. This was obviously done in order to enable the legislature to judge as to whether the railroad management was such as was calculated to conserve the best interests of the public; whether the public were being dealt fairly with by those in charge of such management, and whether changes could not be made which would be beneficial to the community. The State has an interest in such matters, and it is highly proper that the legislature should inquire into them; and should it ascertain that the railroad companies were pursuing a selfish, mercenary course, and disregarding the rights of their patrons, it could provide suitable regulations to remedy the mischief. Whether a railroad company is employing suitable means and appliances for the transportation of freight and passengers over the line of its road with reasonable safety and dispatch, and as cheaply as it can afford to do and obtain a fair profit, in view of the amount of its investment, is always a pertinent subject of inquiry for the legislature; and the object of the act, it seems to me from the general spirit and tenor of it, in creating the board of commissioners and clothing it with the functions it possesses, was for the purpose of making such inquiry. I cannot conclude that the legislature undertook to correct the abuses of railroad companies before it could know with any certainty whether they had been committed. It would not be likely to appoint a commission for execution to precede one of inquiry; nor that it would delegate its discretion in so important a matter to an inferior board to be exercised. The railroad enterprises in this State are as yet in their infancy. The people are greatly interested in having them extended into every district where marketable articles are produced, and it would be very unwise, as well as unjust, to pursue a rash and narrow policy toward them. It is not contended on the part of the respondent that said act invested the board of commissioners with authority to fix the rate to be charged for the transportation of freight or passengers; nor, as I view it, were they empowered

Same—Powers of board to investigate subject.

to determine what charges were reasonable or unreasonable. They were required to make a biennial report to the legislative assembly, with such suggestions "as to what change in the classifications of freight or what change in the rate of freight or fares are advisable for the public welfare." Section 10 of act; also section 17. This is the only provision in the act I have been able to find which imposes any duty upon the board in regard to rates and fares. Section 12 of the act requires the board to investigate complaints made by certain persons against common carriers, subject to the provisions of the act, on account of anything done or omitted to be done by any such common carrier in contravention of its provisions. Section 13 makes it the duty of the board to make a report of an investigation made by it, including findings of fact upon which its conclusions are based. Section 14 makes it the duty of the board, in any case in which an investigation is made, and it appears to the satisfaction of the board that anything has been done or omitted to be done in violation of the provisions of the act or of any law of which the board has cognizance, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, etc. And section 15 makes it the duty of the board, whenever any such common carrier shall violate or refuse or neglect to obey any lawful order or requirement of the board, to enter complaint as therein provided. Neither of these sections, however, specifies the particular subjects to be investigated, nor what acts done or omitted to be done by such common carrier would be a violation of the act or of the law of which the board has cognizance, or what would be a lawful order or requirement of the board; nor does any section of it indicate what law the board has cognizance of. The result is that the act is hopelessly ambiguous as to the jurisdiction of the board beyond the authority before referred to. It has power in conducting its investigations to compel railroad companies to furnish it information as provided in section 19 of the act, and also to compel them to adopt such form of annual statement required by the act of February 26, 1885, to be transmitted to the secretary of State as it may prescribe by virtue of section 20 of the act; but an attempt on the part of the board to adjust claims between railroad companies and persons, firms, corporations, or associations, etc., and to enforce obedience to its orders made in respect thereto in the manner specified in section 15 of the act, would be groping in the dark.

Ambiguousness of act as to jurisdiction.

The first question arising would be, what contentions between

the railroad company and such persons, firms, etc., has its jurisdiction of? The answer to that question cannot be left to speculation. The jurisdiction of such commissions is not given by implication. Commissions of that character are mere creatures of the statute, and possess no power except what the statute expressly confers upon them. Again, if the board had jurisdiction to investigate complaints for overcharges on freight, its order to refund the excess could not be enforced in the manner provided in section 15 of the act. The recovery of money unjustly exacted in such cases is a common-law remedy; and the party against whom the claim is made, whether a natural person or a corporation, has the right to a trial by jury before its repayment can be enforced. A summary remedy of the character of the one provided for cannot be used to enforce a claim for damages arising *ex contractu* or *ex delicto*, though it might be employed to compel the performance of a specific duty necessary to the administration of public affairs. The several sections of the act taken together present an incongruity, and leave an impression that it was made up by a sort of patch-work. Sections 9, 10, 11, and 17 clearly indicate that the object of the investigation of the affairs of railroad corporations is for the purpose of ascertaining facts to be included in the biennial report which the board is required to make to the legislative assembly; while it might be inferred from sections 12, 13, and 14 that its object was to constitute the board a kind of tribunal of conciliation to adjust the claims of persons against the railroad companies and to establish *prima facie* evidence of their validity; and section 15 makes a very lame attempt to compel satisfaction of them. What kind of claims it was intended the board should adjust and require to be satisfied does not appear. If its jurisdiction, however, in that particular is coextensive with its authority to investigate such affairs, it must necessarily extend to claims arising out of torts as well as contracts; as it is required by section 18 of the act to investigate the causes of any accident on any railroad resulting in the loss of life and of any accident not so resulting which it may deem to require investigation. Under this view the board would be the most important tribunal in the State. It could adopt its own code of procedure, formulate its own rules of evidence, be unembarrassed by the presence of a jury, and adjudicate in accordance with its own caprices; and if its orders or requirements were violated or refused or disobeyed it could enter complaint in the circuit court, "sitting in equity," and have a "mandatory process" issued to enforce them. It cannot be presumed that any legislature would confer so important a prerogative upon a board of commissioners; still, we must conclude that it was done in the present case if we sustain

Investigation of overcharges —Order to refund excess.

the view that the authority of the board to adjust matters between persons and railroad companies is coextensive with its authority to investigate them. The counsel for the respondent does not claim that the board has jurisdiction to the extent suggested, but I fail to discover any point short of it to stop, if it is conceded that the jurisdiction includes the matters involved in the present case. It will not be contended that the act gives the board jurisdiction in express terms to determine when freight charges are unreasonable; and if the question is left to inference there is no limit to the extent of its jurisdiction except the limitation of its authority to investigate, and that seems to extend to all the affairs between the railroad corporations and individuals or associations, and to involve every breach of duty of the former and the consequences attending it.

Authority of board must affirmatively appear.

It has for a very long time been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. There is too strong a desire in the human heart to exercise authority, and too much of a disposition upon the part of those intrusted with it to extend it beyond the design for which and the scope within which it was intended it should be exercised, to leave the question of its extent to inference. Should it be so left serious disturbances might arise involving a conflict of jurisdiction, which would be highly detrimental to the community. It is not, it seems to me, requiring too much of the legislative branch of the government to exact, when it creates a commission and clothes it with important functions, that it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent. Under the view we have indicated in the foregoing opinion it follows that the judgment appealed from must be reversed, and the complaint dismissed; and it is so ordered.

Authority and Jurisdiction of State Railroad Commissions.—See Bonham *v.* Columbia, etc., R. Co., 30 Am. & Eng. R. R. Cas. 177; Railroad Commissioners *v.* Railroad Co., 26 Ib. 29; Providence, etc., R. Co. *v.* Norwich, 22 Ib. 493; Merrill *v.* Boston & L. R. Co., 21 Ib. 48.

PENNSYLVANIA R. CO.

v.

STERN. *et al.*

(119 *Pa. St.* 24.)

Carriers—Bills of Lading—Ownership of Goods.—Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same.

Same—Delivery—Production of Bill of Lading.—A railroad company has no right to make a delivery of freight otherwise than in strict accordance with the bill of lading.

Same—Goods Shipped to Order of Consignor.—Where goods are shipped to the order of the consignor, the railroad company is not justified in delivering them to a third person without the bill of lading, and merely upon the production of an invoice and a letter from the consignor giving him notice of a draft, which is to accompany the bill of lading, drawn upon him by the consignor and which he is required to protect.

Same—Improper Delivery—Custom—Damages.—In an action against a railroad company for damages consequent upon the loss of merchandise consigned to plaintiff, occasioned by its improper delivery by defendant to a third person before the production by such person of the bill of lading, and acceptance by him of a draft attached thereto, the fact that defendant had several times previously delivered freight, so consigned, to such third party before the acceptance of like drafts, such drafts, however, having always been paid, will not justify a finding that there was a course of dealing between the parties which would take the case out of the rule requiring that the delivery must be in accordance with the bill of lading and justify defendant in delivering the goods before payment of the draft.

ERROR to review a judgment for plaintiffs, entered on a verdict.

This is an action brought by the firm of Stern & Spiegel against the Pennsylvania R. Co. to recover the value of a car load of bones shipped by plaintiffs over defendant's railroad, and improperly delivered by defendant.

On September 20, 1883, plaintiffs shipped a car load of bones, consigned to themselves, from Bay City, Mich., to Landenburg, Pa., over the Flint & P. M. R., and connecting lines to Pittsburg, thence to Landenburg *via* defendant's railroad. The shippers attached to the bill of lading a draft drawn to their own order, upon Thomas Whann, Jr., Landenburg, Pa., and subject to his acceptance, for $310.15, the net price of the bones, and sent the bill of lading with the draft attached to a Pennsyl-

vania bank for collection. On September 26 the car load of bones arrived at Landenburg and was placed upon Whann's siding there by defendant's agent, at Whann's request, and upon the production by him of the following letter and invoice from plaintiffs:

"CINCINNATI, September 23, 1883.

"THOMAS WHANN, JR., Landenburg, Pa.:

"DEAR SIR: Herewith please find invoice and W. C. car bones forwarded to you. The freight is prepaid for amount of invoice. We have drawn on you as per arrangement. Please protect draft and oblige,

"Very truly yours, STERN & SPIEGEL.

"P.S.—Will forward two more cars shortly."

The invoice was as follows:

"CINCINNATI, Sept. 22, 1883.

"Mr. THOMAS WHANN, JR., Landenburg, Pa.,

"Bought of STERN & SPIEGEL,

"Terms, 45 days acceptance to B-L.

"1 Car bones P., F. W. & C. No. 4212,

Net, 23,285 at $28.00, ... $325.99

"Less difference freight car No. 456, invoice July 30, ... 15.84

$310.15

"Freight prepaid.

"Shipped from Bay City, Mich., *via* F. & P. M. R. R. to B-L. with draft.

"(Flint & Pere Marquette R. R.) Loss and damage. (2) (No. 750 Claim)."

The draft was not accepted; Whann subsequently failed, and the amount due was never paid or any part thereof.

The court below charged the jury as follows: "It is sufficient for me to say to you that this having been a consignment to the order of the plaintiffs which was brought home to the notice of defendant by the manifest received by its agent and production to him of the invoice showing that the delivery of the bones in question was to be made upon the production of the bill of lading, and that there is, in my judgment, nothing in the evidence thus far which excuses the defendant for failure to make delivery according to these terms. In other words, that it could only properly deliver upon the production of the bill of lading, or upon the consent of the plaintifffs, or permission of the plaintiffs given to it in some other way than any which has appeared in evidence in this case. That being my view, the proper verdict for you to render in the case is a verdict for the plaintiffs for the amount of $310.15, with interest from the time when the delivery was made."

John Hampton Barnes and *George Tucker Bispham* for plaintiff in error.

Edward E. Nicholas and *Charles Davis* for defendants in error

PAXSON, J.—The only error assigned is to the charge of the court. It was in substance that the defendant company could only deliver the merchandise upon the production of the bill of lading, and that as there was nothing to excuse delivery without a compliance with the terms, the jury should find for the plaintiffs.

Goods deliverable only on production of bill.

We see no error in this. The plaintiffs shipped this car load of dry bones from Bay City, Mich., to Landenburg, Chester Co., Pa. consigned to themselves. At the same time they drew on Whann for the amount at forty-five days. There was a bill of lading attached to the draft showing that Stern & Spiegel, the shippers, had consigned said car to themselves. The letter of the latter to Whann, and the invoice, both of which were shown to the agent of the defendant company at Landenburg, were notice that there was a draft and bill of lading and that Whann was required to protect the draft.

The agent delivered the car to Whann without the bill of lading and without an acceptance of the draft. This he had no right to do. The titles to the property remained in the consignors until delivery in accordance with conditions.

Bills of lading are symbols of property; and, when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, and to the persons entitled to receive the same. Hieskell *v.* Farmers' Bank, 89 Pa. 155.

There could be no delivery except in accordance with the bill of lading. Dows *v.* Nat. Exchange Bank, 91 U. S. 618 bk. 23, L. Ed. 214; Stollenwerck *v.* Thacher, 115 Mass. 224.

The invoice standing alone furnishes no proof of title.

Benjamin, Sales, par. 332; Dows *v.* Nat. Exchange Bank, *supra.*

It was urged, however, that there was a course of dealing between the parties that would take the case out of the rule above stated. The attention of the court below does not appear to have been called to this matter upon the trial. No reference to it is to be found in the charge, nor was any point submitted which would call it forth. There was evidence that the defendant company had on more than one occasion delivered goods from the same shippers to Whann prior to the acceptance of the drafts. No harm came of this because the drafts were afterwards accepted and paid. But this course of dealing between the company and Whann was not brought home to the knowledge of the plaintiffs in a way that would justify the jury in finding that they had acquiesced in such an arrangement, and that they had consented to the delivery of

Course of dealing—Exception to rule.

this particular car load without the production of the bill of lading and acceptance of the draft. The company delivered in its own wrong and assumed the risk.

Nor can we say as matter of law that plaintiffs suffered no loss by reason of the improper delivery. If the draft had been accepted, it might have been paid, notwithstanding the failure of Whann; or the plaintiffs might have sold it without recourse.

Judgment affirmed.

Bill of Lading—Ownership of Property.—In Benjamin *v.* Levy (Michigan supreme court, June 22, 1888), the court held that, no other facts appearing, the consignee and not the consignor, of property delivered to a common carrier, will be treated and considered as the owner. Citing Fitzhugh *v.* Wiman, 9 N. Y. 559; Greene *v.* Clarke, 12 N. Y. 343.

Same—Delivery without Presenting.—In the case of Boatman's Savings Bank *v.* Western & Atlantic R. Co., 7 S. W. Rep. 125, the supreme court of Georgia hold that, where, by the terms of the bill of lading, the goods are consigned to the order of the consignor, and the bill is indorsed in blank, and negotiated for the value as security for a draft drawn by the consignor on a third person, the carrier has no right to deliver the goods to such third person without production of the bill of lading, or authority from the holder thereof. The court say: "The consigment being to the order of the consignor, the indorsement of the bill of lading by the consignor was the expression of such an order; and the railway company, and the lines with which it was connected in this contract for carriage and delivery, had no right to deliver to J. C. McMillan & Co. without production of the bill of lading or some proper accounting for it. Railroad Co. *v.* Bank, 102 U. S. 27; Bass *v.* Glover, 63 Ga. 745. Where, by terms of the bill of lading, the goods are consigned to the order of the consignor, and the bill is indorsed in blank and negotiated for the value as security for a draft drawn by the consignor on a third person, the carrier has no right to deliver the goods to such third person without production of the bill of lading or authority from the holder thereof.

Same—Custom.—In Weyland *v.* Atchinson, Topeka & Santa Fé R. Co., 39 N. W. Rep. 899. the Iowa supreme court held on hearing, reversing former decisions of the same case, reported in 30 Am. & Eng. R. R. Cas. 102, that, a carrier is liable for goods consigned to the shipper and delivered without orders to a person who ordered the goods and to whom the shipper had sent an unindorsed bill of lading, drawing on him through a bank for the price, and accompanying the draft with another bill of lading and an order for the goods to be delivered on payment of the draft, though the company was ignorant of the sending of the other bill of lading and draft, as well as of the fact that the goods were not paid for; and that the existence of a local custom to deliver goods on the presentation of an unindorsed bill of lading at the place where the delivery was made, the shipper having no knowledge of it, is no defence to an action for the value of goods so delivered.

The court say: "Appellant insists that it was not in fault in delivering the goods to Evans for the reason that the delivery to him of the bill of lading was in effect an assignment of the goods and invested him with a right to demand and receive them. We are referred to many authorities which are claimed to support this view. One of these is Bank *v.* Transportation Co., 69 N. Y. 374. An examination of that case and of the cases therein cited will show that what the court really decided was that a delivery of the forwarder's receipt without assignment, but with intent that the title to the

goods for which it was given or an interest therein should be thereby transferred, would be effectual to accomplish the transfer intended. Other authorities cited by appellant are to the same effect. In this case it was the intention of the canning company to retain the title and right of possession in itself until the price of the goods should be paid. The bill of lading required the delivery of the goods to the consignor. It did not provide for delivery to bearer or order, but to the Elgin Canning Co. Therefore it is clear that the forwarding of the bill of lading to Evans with directions to pay the draft and obtain the order for the goods did not invest him with any right to the goods as against the consignor. But it is said that defendant was justified in delivering the goods to Evans because of his possession of the bill of lading. The cases of Lickbarrow *v.* Mason, 1 Smith, Lead Cas. *838, with annotations; Dows *v.* Greene, 24 N. Y. 638; Allen *v.* Williams, 12 Pick. 297, and others, are cited in support of this claim. It is true that statements were made in some if not all of those cases which, considered apart from the connection in which they are found, might seem to sustain the claim; but when they are considered in connection with the facts of the cases where found, and the general conclusions of the court which made them, we think they go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties. In Fearon *v.* Bowers, reported in 1 Smith, Lead Cas. *782, cited by appellant, the consignor had sent two bills of lading, one of which was indorsed to one person and the other to another, and the court held that a delivery might be made to the holder of either bill. That case has but little relation to the principle involved in this. Appellant insists that the bill of lading is like a promissory note, in that possession is *prima facie* evidence of ownership; but we do not think that such is the case. A bill of lading is a non-negotiable instrument. Bank *v.* Railway Co., 67 Iowa, 534; s. c., 23 Am. & Eng. R. R. Cas. 695." The following language is pertinent: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. . . . They are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing a different function." Also: "It is not a representative of money, used for transmission of money or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods; but if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen.' Shaw *v.* Railroad Co., 101 U. S. 557. See, also, Hutch. Carr. § 348. In 2 Pars. Cont. 292, it is said: "The consignor frequently sends to a consignee a bill not indorsed, and then sends to his own agent in or within reach of the same port an indorsed bill,—it may be indorsed in blank, or to the agent, or to the party ordering the goods,—and the consignor sends to his agent with the bill orders to deliver the bill to the party ordering the goods, or to receive the goods and deliver them to him, provided payment be made or secured, or such other terms as the consignor prescribes are complied with. This course secures to the consignor, beyond all question, the right and power of retaining the goods until the price for them is paid or secured to him." This is not only in point, but seems to be sound in principle. The fact that Evans presented the bill of lading in this case was not sufficient to overcome the presumption which the terms of the bill raised that the consignee was the owner of the goods. That such is the presumption is well established. Congar *v.* Railroad Co., 17 Wis. 485; Krulder *v.* Ellison, 47 N. Y. 37; Lawrence *v.* Minturn, 17

How. 100; Alderman *v.* Railroad Co., 115 Mass. 234. See, also, Tuttle *v.* Becker, 47 Iowa, 486; 1 Benj. Sales, §§ 577, 579; 2 Amer. & Eng. Cyclop. Law, 242, 243. The contract with the canning company required the defendant to deliver the goods to the consignor. The unindorsed bill of lading presented by Evans was evidence that the contract was still in force, and that the canning company was then the owner of the goods. The delivery to Evans was not authorized, and was made by defendant at its own risk. Hutch. Carr. §§ 129, 130, 344. See generally as to delivery of goods without requiring presentation of bill of lading. Furman *v.* Union Pac. R. Co., 32 Am. & Eng. R. R. Cas. 500, note 508; Weyland *v.* Atchison, etc. R. Co., 30 Ib. 102.

NORTHERN PENNSYLVANIA R. CO.

v.

COMMERCIAL BANK OF CHICAGO.

(123 *U. S.* 727.)

Railroad Companies—Carrying Live Stock—Obligations.—Where a railroad company undertakes to carry live stock, it becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of other freight.

Same—Delivery without Bill of Lading—Liability—Usage.—Where a railroad company receives for transportation cattle consigned to the order of the shipper with directions to notify a certain person, at the place of destination, and delivers them to the party, whom it is directed to notify, without the production of the bill of lading, it will be liable to a bank discounting consignor's draft upon the person whom it was directed to notify for the value of the cattle so delivered; and the fact that it has been customary for defendant to so deliver other shipments of cattle between the same parties is no defence, where it is not shown that such custom was brought to the knowledge of the consignor.

Same—Federal Courts—Directing Verdict.—It is proper for the United States Circuit Court to direct a verdict for plaintiff, where no matter affecting his claim is left in doubt, and all the evidence, taken together, clearly shows that he is entitled to recovery.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action brought by the Commercial National Bank of Chicago against the North Pennsylvania R. Co. to recover the value of 404 head of cattle received by it in November, 1877, to transport to Philadelphia, and not delivered there to the plaintiff, the assignee of the shipper, or to its order. The facts out of which it arose are briefly as follows:

In 1877 one Paris Myrick was engaged at Chicago in the business of buying cattle and forwarding them by railway to

Philadelphia. On the 7th of November of that year he bought 202 head of cattle, weighing 240,000 pounds, and on the same day delivered them to the Michigan Central R. Co. at Chicago, to be transported to Philadelphia. That company is one of several railway carriers forming a continuous line from Chicago to Philadelphia. On the delivery of the cattle, Myrick took from the company the following receipt:

"MICHIGAN CENTRAL RAILROAD COMPANY,
"CHICAGO STATION, *Nov. 7th*, 1877.

"Received from Paris Myrick in apparent good order. Consigned to order Paris Myrick.

"Notify J. & W. Blaker, Philadelphia, Pa.

Articles.	Marked.	Weight or measure.
"Two hundred & two (202) Cattle.		240,000

"Advanced charges $12.00.

"Marked and described as above (contents and value otherwise unknown), for transportation by the Michigan Central Railroad Company to the warehouse at * * *

"Notice.—See rules of transportation on the back hereof.

"Use separate receipts for each consignment.

"WM. GROGAN, *Agent.*"

On the margin of the receipt was the following notice:

"This company will not hold itself responsible for the accuracy of these weights as between buyer and seller; the approximate weight having been ascertained by track scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller.

"This receipt can be exchanged for a through bill of lading."

On the same day Myrick drew and delivered to the Commercial National Bank of Chicago a draft, of which the following is a copy:

"$12,287.57. CHICAGO, *Nov. 7th*, 1877.

"Pay to the order of George L. Otis, cashier, twelve thousand two hundred and eighty-seven $\frac{57}{100}$ dollars, value received, and charge the same to account of— PARIS MYRICK.

"To J. &. W. Blaker, Newtown, Bucks Co., Pa."

As security for the payment of the draft, Myrick indorsed the receipt obtained from the railroad company and delivered it with the draft to the bank, which thereupon gave him the money.

On the 14th of November, Myrick purchased 202 more head of cattle, weighing 260,000 pounds, and on that day delivered them to the Michigan Central R. Co. at Chicago, to be trans-

ported to Philadelphia, and received from the company a receipt similar to the one taken on the first shipment. On the same day he drew another draft and delivered it to the Commercial National Bank, of which the following is a copy:

"$12,448.12. CHICAGO, *Nov.* 14, 1877.

"Pay to the order of Geo. L. Otis, cashier, twelve thousand four hundred & forty-eight $\frac{12}{100}$ dollars, value received, and charge same to account of— PARIS MYRICK.

"To J. & W. Blaker, Newtown, Bucks Co., Pa."

For the payment of this draft, Myrick indorsed the receipt obtained from the railroad company, and delivered it with the draft to the bank, which thereupon gave him the money. The cattle of both shipments were conveyed on the road of the Michigan Central R. Co. to Detroit, and thence over the roads of other connecting companies to Philadelphia. The last two carriers were the Lehigh Valley R. Co. and the North Pennsylvania R. Co., whose lines extended between Waverly, Tioga County, N. Y., and Philadelphia. The cattle of both shipments were carried over the roads of these companies from Waverly on their joint way-bills. The thirteen covering the first shipment were dated November 10, 1877, and twelve of them were alike except in the number of cattle carried under them. The following is a copy of one of them:

Form 24—L. *Joint Way-Bill.*

Way-bill of merchandise transported by L. V. R. R. and N. P. R. R., from Waverly to Philad'a, Nov. 10th, 1877.

Kind and number of car.	Consignee or owner's name.	Description of articles.	Weight. 1st class.	Weight. 2d class.	Weight. 3d class.	Weight. 4th class.	Weight. Class A.	Rate.	Prepaid.	Freight.	Expenses.	Consignor.
Erie, 30483...	P. Myrick. Notify J. & W. Blaker.	18 cattle, rec.	20,000				.. .	15 75	..	31 50	21 86	Buffalo.

E., 10.93; L. V. & N. P., $15.75. Chicago thro', 58c.

In the thirteenth joint way-bill of the first shipment the words "Notify J. & W. Blaker," were omitted.

The joint way-bills covering the second shipment were dated November 17, 1877, but, like the thirteenth joint way-bill of the first shipment, they did not contain the words "Notify J. & W. Blaker" after the name of the consignee or owner. In other respects, except in the number of cattle carried, they were similar to those covering the first shipment.

The cattle of both shipments arrived in Philadelphia—the first on November 11, and the second on November 18—and were immediately delivered by the Pennsylvania R. Co. to the North

Philadelphia Drove Yard Co., which was formed for the purpose of receiving, taking care of, and delivering live-stock to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties. The Blakers were dealers in cattle, and had particular pens in the yard assigned to them. The cattle of both shipments were placed in these pens by the agent of the railroad company at the drove-yard station, and he then wrote on the thirteenth joint way-bill of the first shipment, and on all the joint way-bills of the last shipment from Waverly, under the name of the consignee or owner, these words: "Ac. J. & W. Blaker." On the day after they arrived and were placed in these pens, in each case, the Blakers sold the cattle and appropriated the proceeds. The cattle of both shipments were delivered by the railroad company to the drove-yard company without any direction to hold the cattle subject to the order of the consignee, who was also the owner and shipper, and the cattle were delivered to the Blakers without such order. It does not appear that any demand was made by the railroad company, or by the drove-yard company, for anything to show the right of those parties to receive the cattle.

The bank transmitted the drafts for collection, with the carriers' receipts attached, to its correspondent at Newtown, Pennsylvania. The Blakers were notified of the receipt of the drafts, but failed to accept them, and they were protested for non-acceptance, Nov. 27, 1877. They disposed of the cattle before the arrival of the drafts and carriers' receipts, and soon afterwards failed, and the drafts were not paid.

It appeared in evidence that Myrick had previously made numerous shipments of cattle from Chicago to Philadelphia, and taken similar receipts from the Michigan Central R. Co.; that these cattle had been received by the North Pennsylvania R. Co. and delivered by it at Philadelphia to the drove-yard company; that it had been the practice of that railroad company to deliver the cattle to the drove-yard company, and of the latter company to deliver them to the Blakers without the production of the carrier's receipt or any bill of lading, or any order of the shipper for their delivery. It also appeared that there was no knowledge on the part of the Commercial Bank at Chicago, or of its correspondent at Newtown, of any such practice; that drafts of Myrick, cashed by that bank, had accompanied previous shipments of cattle; that such drafts, upon notice to the Blakers of their receipt, had always been promptly paid, and that the bills of lading (the carriers' receipts in question) were not surrendered to the Blakers until such payment.

Upon these facts the Commercial National Bank originally recovered a verdict and judgment against the Michigan Central

R. Co., the court below holding that the receipts of that company constituted contracts to carry the cattle from Chicago to Philadelphia, and deliver them there to the shipper or to his order; but the judgment was reversed by this court on the ground that a through contract for their carriage was not established by those receipts, and that the question of whether or not there was such a contract for their carriage should have been submitted to the jury to determine from the circumstances of the case. Myrick *v.* Michigan Central R. Co., 107 U. S. 102. The present action was subsequently brought against the North Pennsylvania R. Co., the last of the series of railroad carriers in the line from Chicago to Philadelphia, for the non-delivery at Philadelphia of the cattle of both shipments to the order of the shipper, as designated in the receipts given to him at Chicago, and in the way-bills given at Waverly, that is, to his assignee, the plaintiff herein. Upon the evidence in the case, which developed the facts substantially as stated, the court directed a verdict for the plaintiff for the amount of ts claim. A verdict was accordingly rendered for $34,271.41 which was the amount of the drafts.

William Rotch Wister and *George F. Edmunds* for plaintiff in error.

Wayne McVeagh for defendant in error. *J. A. Sleeper* filed a brief for same.

Circuit court directing verdict.

FIELD, J.—There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict, if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way. Anderson County Commissioners *v.* Beal, 113 U. S. 227, 241.

Duty of carrier as to delivery —Live stock.

Upon the evidence presented, and there was no conflict in it, the law was with the plaintiff. The duty of a common carrier is not merely to carry safely the goods intrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which would release him from his duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the

inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of live-stock, is more strictly enforced. Forbes *v.* Boston & Lowell R. Co., 133 Mass. 154; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34.

If the consignee is absent from the place of destination, or cannot, after reasonable inquiries, be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person to be kept on account of and at the expense of the owner. He cannot release himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them. Fisk *v.* Newton, 1 Denio, 45. If the freight consist, as in this case, of live-stock, the carrier will not, under the circumstances mentioned, that is, when the consignee is absent or cannot after reasonable inquiries be found, and no one appears to represent him, relieve himself from responsibility by turning the animals loose. He must place them in some suitable quarters where they can be properly fed and sheltered, under the charge of a competent person as his agent, or for account and at the expense of the owner. Turning them loose without a keeper or delivering them to one not entitled to receive them would equally constitute a breach of duty for which he could be held accountable. These principles are firmly established by the adjudged cases, and rest upon obvious grounds of justice. Angell on Carriers, § 291.

Duty of carrier when consignee cannot be found.

The railroad company, defendant below, should, therefore, have given necessary instructions to the drove-yard company, which was its agent for the custody and care of the cattle, respecting their delivery—that it should be made only upon the order of the consignee, who was also the owner and shipper. The joint way-bills given by the two companies at Waverly, equally with the original receipts given at Chicago, disclosed his

name. Those joint way-bills were for the guidance of, and were used by, the conductors of both companies.

Authorities—The Thames.

In the case of The Thames, 14 Wall. 98, it appeared that the purchaser of cotton at Savannah delivered it there to a vessel to be carried to New York, taking bills of lading, in which it was stated that the cotton was shipped by one Gilbert Van Pelt, and was to be delivered "unto order or to his or their assigns." Van Pelt was a member of a firm in New York, for which he purchased the cotton. Against the shipment he drew a draft on his firm, payable fifteen days after sight, and delivered it, with the bills of lading, to parties who obtained a discount of the draft from a bank in Atlanta. The draft and bills were at once forwarded to New York to an agent of the bank, to procure their acceptance by the firm. Before the draft became due the vessel arrived at New York and gave notice to the firm of the arrival of the cotton. That vessel had previously brought cotton in the same way for the firm, and the master of the vessel, knowing that the cotton was intended for the firm, and having no information from the bank's agent, or from any other source, of any other consignee or claimant, delivered to it the cotton, taking its receipt. When the draft became due, two weeks afterwards, and was not paid, the cotton was demanded of the owner of the vessel by the bank's agent. In the action which followed it was contended by the owner that the delivery was justified, and that the vessel had discharged its obligation, but this court held that, though the delivery had been made in ignorance of the any outstanding claim to the cotton, it was, nevertheless, a breach of the contract of affreightment, and that the agent of the bank could libel the vessel, which was bound for the proper delivery of the property, for the loss sustained. And the court said: "By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when the consignee is unknown, or is absent, or cannot be found after diligent search. And if, after inquiry, the consignee or the indorsee of the bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from the carrier's responsibility. He has no right under any circumstances to deliver to a stranger."

The direction on the receipts given at Chicago, and on the way-bills of the first shipment from Waverly, to "notify J. & W. Blaker," in no respect qualified the duty of the carrier to deliver the animals to the order of the consignee. If they were consignees, the direction to notify them would be entirely unnecessary, because the duty of the carrier is to notify the consignee on the arrival of goods at their place of destination. In the case of Furman *v.* Union Pacific R. Co., recently decided by the court of appeals of New York, 106 N. Y. 579; s. c., 32 Am. & Eng. R. R. Cas. 500, it was held that placing in a bill of lading a direction to notify certain persons is a plain indication in the absence of further directions, that they are not the consignees. The earlier case of Bank of Commerce *v.* Bissell, 72 N. Y. 615, is also in point on this subject. There the action was against the defendants as common carriers upon a bill of lading of a boat-load of wheat shipped at Buffalo for transportation to New York on account and order of the plaintiff. The bill of lading contained this direction: "Notify E. S. Brown, New York," and was given to the bank as security for a draft drawn by the shippers on Brown. With the draft annexed it was forwarded to New York, with an indorsement by the cashier of the bank that the wheat was subject to payment of the draft, and was to be delivered only on such payment. On the arrival of the wheat in New York it was delivered to Brown, and he became insolvent before the draft fell due. It was held that the defendants were not warranted by the bill of lading in delivering the wheat to Brown, and that the discount of the draft and its acceptance did not justify the delivery. It was also held that the fact that the plaintiff did not indorse over the bill of lading to any one in New York authorizing him to receive the wheat, did not relieve the defendants from the duty of holding it as plaintiff's property or subject to its lien; that they could have given notice to Brown, "and if neither he nor any one else came with authority to take delivery, they could, and it was their duty to have put the wheat in store."

Effect of directions to "notify" parties—Authorities.

It follows from those views that the defendant, the North Pennsylvania R. Co., in allowing the cattle to go into the possession of the Blakers, through its agent, the drove-yard company, without the order of the consignee, who, as stated above, was also the owner and shipper, became responsible for their value to the Commercial National Bank, which held his orders indorsed on the receipts for the shipments. It is true that the original receipts only bound the Michigan Central R. Co. to carry safely the animals on its own road and deliver them safely to the next connecting line to carry on the route beyond. Myrick *v.* Michigan Central

Liability of last carrier for misdelivery.

R. Co., 107 U. S. 102. But the last carrier in the connecting lines was bound to deliver the animals at the place of destination, and to the consignee there, or to his order, if they were made known to it on receiving the freight from the preceding connecting company. In this case there is no question that the company had such knowledge when the cattle were received. The destination and the name of the consignee appear upon the way-bills given at Waverly. There were only two places at which the cattle were, on their way from Chicago, reshipped, that is, taken from the cars, and, after a short interval of rest, replaced. Waverly was one of these places, and when they were reshipped there these way-bills, with a designation of the destination and consignee of the cattle, were made out.

Custom as to delivery without production of bill.

The indorsement by Myrick to the plaintiff, the Commercial Bank of Chicago, of the receipts, taken on the shipment of the cattle, transferred their title, and gave to the bank the right to their possession, and, if necessary, to sell them for the payment of the drafts. The fact that the railroad company at Philadelphia had been in the habit of delivering cattle, transported by it, to the Blakers through the drove-yard company, without requiring the production of any bill of lading or receipt of the carrier given to the shipper, or any authority of the shipper, in no respect relieved the company from liability for the cattle in this case. It was not shown that the shipper or the bank which took the draft against the shipment, or its correspondent at Newtown in Pennsylvania, had any knowledge of the practice, and, therefore, if any force can be given to such a practice in any case, it cannot be given in this case where the party sought to be affected had no knowledge of its existence. In Bank of Commerce *v.* Bissell, cited above, the defendants offered to prove a custom in New York to deliver property under bills of lading to the person who was to have notice of its arrival. The evidence was rejected, and the court of appeals held that there was no error in its rejection, stating that if the custom were established it could not subvert a positive, unambiguous contract.

Numerous other assignments of error are presented for which a reversal of the judgment is asked, but the propositions of law embodied in them were not urged in the court below, and, therefore, the fact that the court did not rule upon them constitutes no ground for interference with the judgment. The one exception taken was to the direction of the court upon the evidence to find a verdict for the plaintiff for the amount claimed. To that direction the defendant excepted, and it is at liberty to show, either that there was sufficient evidence to go to the jury, or that questions of law apparent upon the record would control the case in opposition to the direction. But this it has not done.

As before stated, there was no conflict in the evidence, and the law upon it was clearly with the plaintiff.

The judgment is therefore affirmed.

Delivery of Goods Without Requiring Production of Bill of Lading.—See, *ante*, Pennsylvania R. Co. *v.* Stern, 551, and note, 554–556.

MERCHANTS' DESPATCH TRANSPORTATION CO.

v.

HATELY *et al.*

(14 *Supreme Court, Canada*, 572.)

Carriers—Connecting Lines—Bills of Lading—Terms of Contract—Custody of Goods—Delivery—Negligence.—The M. D. T. Co. through one B. contracted with H. to carry a quantity of butter from London, Ontario, to England, and bills of lading were signed by B., describing himself as agent severally but not jointly, for the G. W. R. Co., the M. D. T. Co., and the G. W. S. S. Co. named as carriers therein. The G. W. R. Co. were to carry the goods from London to the Suspension Bridge, the M. D. T. Co. from the Suspension Bridge to New York, and it was then to be delivered to the S. S. Co. for carriage to England. It was provided by one clause in the bill of lading that if damage was caused to the goods during transit the sole liability was to be on the company having the custody thereof at the time of such damage occurring. The butter was carried to New York where it was taken from the car and placed in lighters owned by the M. D. T. Co. to be conveyed to the steamer "Dorset" belonging to the S. S. Co. On arriving at the pier where the steamer lay the lighter could not get near enough to unload, and the stevedore in charge of the steamer had it towed across the river with instructions for it to remain until sent for. The "Dorset" sailed without the butter which was sent by another steamer of the S. S. Co. some five days later. The butter was damaged by the heat while in the lighter. *Held*, affirming the judgment of the court below, that the M. D. T. Co. having made a through contract for the carriage of the goods they were liable to H. for the damage, and even under the bill of lading were not relieved from liability as the butter was never delivered to, and received by, the S. S. Co. but was in the custody of the M. D. T. Co. when the damage occurred.

APPEAL from a decision of the Court of Appeals for Ontario, 12 Ont. App. R. 201, affirming the judgment of the Divisional Court, 4 O. R. 723, in favor of the plaintiff.

The facts of the case as far as they affect the appeal to the Supreme Court may be stated as follows.

The plaintiff, Hately, was an extensive shipper of butter and cheese from London, Ont., to England, and in August, 1881, he applied by telegram to the agent of the Merchants' Despatch

Co. for the carriage of three hundred packages of butter to England. The following telegrams passed between Hately and the agent:

"TORONTO, August 22, 1881.

"To JOHN BARR:

"Will give you car butter, London—300 packages for London—one for Bristol—one for Cardiff. Will ship Tuesday for Saturday's steamer at 63 cents. Say quick if you accept, and if you can get it through. W. C. HATLEY."

"August 22, 1881.

"To W. T. HATELY:

"Sixty-four best can do—steamers 27th—if they will take it. Answer, and will wire New York to place.

"JOHN BARR."

"August 22, 1881.

"To JOHN BAI R:

"Your list says steamers 'Bristol' and 'Cardiff' Saturday. Will ship butter to-morrow for them at rate you name.

"W. C. HATELY."

"August 22, 1881.

"To W. C. HATELY:

"Ship your London butter *via* Great Western. You can get refrigerators there. I have advised Western.

"JOHN BARR."

The Despatch Co. had traffic arrangements with the Great Western R. Co. and the Great Western S. S. Co., and Barr was their general agent at Toronto.

The agent notified the Great Western R. Co. of the arrangement with Hately, and the butter was shipped by the Great Western on August 23. Bills of lading were signed as follows:

"FOREIGN BILL OF LADING.

"GREAT WESTERN RAILWAY,

"Merchants' Despatch Transportation Co., and the Great Western Line of Steamships from New York. From London, Ont., to Bristol, England.

"Shipped in apparent good order, by W. C. Hately, the packages, property or articles marked, numbered, and specified as below. Contents, gauge, value, and condition of contents unknown. Weights subject to correction.

"To be delivered in like good order and condition unto order, or to his assigns, he or they paying freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of gross weight delivered, with average accustomed (at $4.80 to the pound sterling), under the following terms and conditions, viz.: . . .

"Through rate 64c. gold per 100 lbs. Gross weight 9639 lbs.

"☞ The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment.

MARKS AND NUMBERS.	MERCHANDISE.
One hundred and fifty (150). P. 2 Top. P. Side. Car 2872, M. D. T.	Packages of butter. Iceing to be charged forward.

"3. It is further agreed, that the said Great Western Railway, and its connections, shall not be held accountable for any damage or deficiency in packages after the same have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts as they may be delivered to them.

"4. It is further stipulated and agreed, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"6. It is further agreed, that the said Great Western Railway, and its connections, have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named herein; and this contract is executed and accomplished, and the liability of the Great Western Railway, and its connections, as common carriers thereunder, terminates on the delivery of the goods or property to the steamer or steamship company's pier at New York, when the responsibility of the steamship company commences, and not before."

The bills of lading were signed by "William Brown, agent severally but not jointly," and endorsed by Hately and the consignees.

The Great Western R. Co. were to forward the butter to the Suspension Bridge and the Despatch Company thence to New

York, where it was to be delivered on board a steamer of the S. S. Co., who were to carry it to England. This arrangement was carried out, but when the butter was taken from the cars at New York and placed in lighters to be put on board the steamer Dorset, then in dock, a delay occurred. The lighter could not get near enough to place the butter either on the steamer or the pier at which she lay, and the stevedore in charge of the steamer caused the lighter to be towed across the river to Brooklyn, directing the lighter-man to remain there until he sent a tug to bring it back. The Dorset sailed on September 3d without the butter, and it was finally sent by the "Bristol," another steamer of the S. S. Co., on September 7th. On arrival in England the butter was found to be injured by the heat.

Hately brought an action against all three companies and on the first trial he was non-suited on the ground that the action should have been brought by the consignee who had paid him for the butter. The divisional court set aside the non-suit, and allowed the consignee to be joined as plaintiff in the action. That decision is reported in 2 O. R. 385. The action was tried again and Hately obtained a verdict against all the defendants. The Despatch Company appealed from the judgment at the trial directly to the court of appeal, and the other defendants to the divisional court. The latter court sustained the verdict against the S. S. Co., who then appealed to the court of appeal which reversed the decision of the divisional court and affirmed that of the judge at the trial, as to the Despatch Company, leaving the plaintiff with his verdict against that company. The latter company then appealed to the supreme court of Canada.

Robinson, Q.C., and *Millar* for the appellants.

Moss, Q.C., for the respondent.

Sir W. J. RITCHIE, C.J.—It appears to me that the only question in this case is: Was the butter delivered in good condition to the steamer or steamship company's piers at New York, as the defendants undertook to do, and if it was not was the butter damaged while in charge of the Transportation Co. in accordance with the terms of the condition contained in the bill of lading? It is abundantly clear that under the bill of lading placing the butter on board the barge at New York was not a delivery to the steamship company. It seems to me that the fact of sending the goods away from the pier was a refusal to receive them and I cannot see that the transportation company, as against the plaintiff, while the goods were on board the barge had any right to leave the pier with them and remain away for so long a time as to destroy the butter. They should, in my opinion, have insisted on the acceptance of the goods at the

Question presented.

Goods not delivered to steamship company—Delay.

pier; if the steamship wrongfully neglected or refused to accept the goods I cannot see that this is any answer to the plaintiff's claim, though it may, between the transportation and the steamship company, be a matter for controversy. The transportation company assumed the responsibility of seeing that the goods were delivered on the pier in such manner that they could be shipped by the first steamer, which it is quite clear they might have been on board the "Dorset," which sailed on the 3d of September. It is said that the barge or lighter could not get to the pier; in my opinion whether it could or not get to the pier should have been first ascertained, and a perishable article such as butter should not have been sent away under such a heated atmosphere until it was ascertained that it would reach the pier without unreasonable delay, which was obviously not possible in this case by reason of other lighters engaged in unloading the "Dorset," and the lighter with the butter was sent away because it was blocking the way showing very clearly that the butter was sent too soon and should not have been removed from the ice car until a proper delivery in the terms of the bill of lading could have been effected.

In this case I can see no reason why, if the barge could not reach the pier, instead of sending the barge away, as was done, the butter was not immediately returned to the ice car from which it had been taken, and kept there until the delivery at the pier could be effected. If the butter was improperly moved at the instigation of the steamship company before it could be rereived at the pier that might possibly form a very good subject for a claim by the transportation company against the steamship company, but I entirely fail to see how it is an answer to the unfortunate owner of the butter who had a right to look to the transportation company to see that his property was delivered at the pier in a position to be then and there shipped from the pier.

Therefore I think there was no delivery to the steamship company or the steamship company's pier until after the damage to the butter occurred, which took place while in the possession of the transportation company and for which they are responsible, in my opinion, to the plaintiffs.

STRONG, J.—For the reasons assigned by the court of appeal I am of opinion that the judgment appealed against ought to be affirmed.

FOURNIER, J.—Concurred.

HENRY, J.—I am of opinion that the appellant company were

the original contractors to carry the butter from the place where it was delivered to them to England, and that the bill of lading only settles the liability between the different carriers. There was no privity of contract between the shipper and the steamer.

No contract between steamer and shipper.

The transportation company were guilty of gross negligence in taking the butter out of the ice car in the hot weather of New York and exposing it to the sun in a lighter. They should not have moved it in the heat of the sun until it was in a position to be placed on board the steamer, and when the steamer authorities declined to take immediate delivery of the butter it was the duty of the transportation company, who owned the lighters, to place it in a position where it would be preserved until it could be received by the steamer. The company were guilty of express negligenee, and for these reasons I think the judgment of the court of appeal was right and that this appeal should be dismissed with costs.

Negligence of transportation company.

TASCHEREAU, J.—I concur in the judgment delivered by the chief justice, and for the reasons given by him I think this appeal should be dismissed with costs.

GWYNNE, J.—The Merchants' Despatch Transportation Co. are, in my opinion, clearly liable for the loss of the butter in question as the parties who contracted with the plaintiff Hately to convey the butter to England, whatever may be their rights over against the Great Western R. Co. or the New York Central & Hudson River R. Co. or the Steamship Co. with whom they contracted for the actual carriage of the butter. The plaintiff Hately in delivering the butter to the Great Western R. Co. at London, was acting merely in pursuance of the instructions given to him by the Despatch Transportation Co. and for the purpose of enabling that company to fulfil their contract with him, and they cannot now be heard to claim exemption from liability under their contract by appealing to the bill of lading which in pursuance of the arrangements existing between the Despatch Co. and the railway companies through whom the former company carry on their business, the Great Western R. Co. issued to Hately. The difficulty which this case presented in the courts below appears to have arisen wholly from the mode in which the Merchants' Despatch Transportation Co. transact their business—a mode designed apparently for the purpose of mystifying the persons with whom they enter into contracts and of throwing difficulties in the way of their recovering compensation for undoubted injuries, by attempts to shift their own responsibility to some or one of the carriers with whom, to enable them

Transportation company contracted to ship goods to London.

to carry on their business as a Despatch Transportation Co., they find it to be their interest to enter into special arrangements. There is no such difficulty in the case before us as the Despatch Transportation Co. are the only defendants who are parties to this appeal, and as to their liability there can, I think, be no doubt.

Appeal dismissed with costs.

Carriers—Delay in Transporting.—A carrier is responsible in damages for a failure to ship goods within a reasonable time after they are received. Rome R. Co. *v.* Sullivan, 32 Ga. 400; Kent *v.* Hudson R. Co., 22 Barb. (N. Y.) 278. Where the carrier makes an express contract for carriage and delivery within a specified time, he is bound to the fulfilment of that contract and is liable for delay from whatever cause the delay may have arisen. Wood *v.* Chicago & M. R. Co., 59 Iowa, 196; s. c., 24 Am. & Eng. R. R. Cas. 91; overruling Wood *v.* Chicago & M. R. Co., 68 Iowa, 491; s. c., 21 Am. & Eng. R. R. Cas. 36; Knowles *v.* Dabney, 105 Mass. 437; Gage *v.* Terrell, 91 Mass. (9 Allen) 299; Wareham Bank *v.* Burt, 87 Mass. (5 Allen) 113; Terrill *v.* Gage, 86 Mass. (4 Allen) 251; Higginson *v.* Weld, 80 Mass. (14 Gray) 465; Ball *v.* Wabash R. Co., 83 Mo. 574; Collier *v.* Swinney, 16 Mo. 484; Harmony *v.* Bingham, 1 Duer (N. Y.), 209; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19; Hand *v.* Baynes, 4 Whart. (Pa.) 214; Texas Pac. R. Co. *v.* Nicholson, 61 Tex. 491; s. c., 21 Am. & Eng. R. R. Cas. 133; The Harriman, 76 U. S. (9 Wall.) 161; bk. 19, L. ed. 629; Great Northern R. Co. *v.* Hawcroft, 21 L. J. Q. B. 178; Robinson *v.* Dunmore, 2 Bos. & P. 416. Where no specific time has been named within which the carriage and delivery is to be made a reasonable time will be implied. Illinois Cent. R. Co. *v.* Waters, 41 Ill. 73; Michigan R. Co. *v.* Day, 20 Ill. 375; Chicago, etc., R. Co. *v.* Dawson, 79 Mo. 296; s. c., 18 Am. & Eng. R. R. Cas. 521; Wilbert *v.* New York R. Co., 19 Barb. (N. Y.) 36; Parsons *v.* Hardy, 14 Wend. (N. Y.) 215; Bonner *v.* Merchants' Steamboat Co., 1 Jones (N. C.) L. 211; Ludwig *v.* Meyre, 5 Watts & S. (Pa.) 438; Hill *v.* Humphreys, 5 Watts & S. (Pa.) 123; Eagle *v.* White, 6 Whart. (Pa.) 505; Nettles *v.* South Carolina R. Co., 7 Rich. (S. C.) 190; East Tennessee R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272; Mann *v.* Burchard, 40 Vt. 326; McLaren *v.* Detroit R. Co., 23 Wis. 138; Nudd *v.* Wells, 11 Wis. 407; D'Arc *v.* London R. Co., L. R. 9 C. P. 325; Hales *v.* London R. Co., 4 B. & S. 66; s. c., 32 L. J. Q. B. 292; Hughes *v.* Great Western R. Co., 14 C. B. 637; s. c., 25 Eng. L. & Eq. 283; Robinson *v.* Great Western R. Co., 35 L. J. (N. S.) C. P. 123; Raphael *v.* Pickford, 5 M. & G. 558; Donohoe *v.* London R. Co., 15 W. R. 793. See, *post*, Ayres *v.* Chicago & N. W. R. Co., and note.

As for damages for failure to carry. See, *post*, Haas *v.* Kansas City & F. S. & Gulf R. Co. 572, and note, 575.

Whether goods shipped are carried and delivered within a reasonable time is a question of fact for the jury and depends upon the facts of each case. Col. W. R. Co. *v.* Flournoy, 75 Ga. 745. The season of the year is also to be considered because the same delay that at one time might not be harmless, at another time might be a serious injury. Vicksburg & M. R. Co. *v.* Ragsdale, 46 Miss. 458; McGraw *v.* Baltimore R. Co., 18 W. Va. 61; s. c., 19 Am. & Eng. R. R. Cas. 188.

Same—Neglect to Forward Goods.—Where the agent of a railroad company for the delivery of freight is authorized to make all necessary arrangements as to the time and place of its delivery agrees to forward freight by another line if this agreement is neglected the railroad company will be liable. Michigan S. & N. I. R. Co. *v.* Day, 20 Ill. 375.

What Amounts to Contract to Ship to Destination.—See Rickerson R. M. Co. *v.* Grand Rapids & I. R. Co., 32 Am. & Eng. R. R. Cas. 487; note 496.

HAAS

v.

KANSAS CITY, FORT SCOTT AND GULF R. CO.

(*Georgia Supreme Court, Oct.* 10, 1888.)

Carriers of Goods—Delay in Delivery—Strike.—A railroad company is not liable for loss occasioned by delay in delivering freight, caused by a strike of its employees, accompanied by intimidation and violence which could not be prevented or suppressed by either the company or the civil authorities.

Same—Delay—Suit by Consignee.—Where a contract for the transportation of freight is made by a railroad company with the consignor, the consignee cannot sue for damages caused by delay in delivery, unless the consignor has assigned or indorsed to him the bill of lading.

Same—Damages—Depreciation of Market.—A consignee cannot recover damages for delay in the delivery of merchandise consigned to him as purchaser, occasioned by depreciation in the market price, unless he shows that the proceeds of the consignment were less than the purchase price paid by him.

ERROR from a judgment in favor of defendant in an action against the Kansas City, Fort Scott & Gulf R. Co. for damages for delay in the delivery of freight consigned to plaintiff.

Weil & Brandt for plaintiff in error.

Calhoun, King & Spalding for defendant in error.

SIMMONS, J.—The only question argued before us in this case was whether the verdict was contrary to the evidence or not. We have carefully examined the evidence set up in the record, and we think that the verdict was right. The plaintiff brought suit by attachment, upon a contract or bill of lading made by the defendant in Kansas City, whereby the defendant agreed with one Ayres to ship a certain quantity of flour from that place to Atlanta, Ga., to the order of Ayres. Ayres, it seems, drew a draft on Haas, the plaintiff, and attached thereto the bill of lading. The amount of the draft, the date when drawn, and the time when Haas received it and accepted it, are not stated in the evidence. Haas testified that the flour ought to have arrived in Atlanta from Kansas City in from seven to ten days from the time of shipment. Instead of so arriving, it did not arrive until about a month after the date of the bill of lading, and by reason of this delay Haas testified that he lost $163; that the price of flour between the date of the bill of

Facts.

lading and the time of its arrival had decreased so as to produce this loss. The defence of the railroad company was that the delay in the shipment of the flour arose by reason of a strike of the operatives of one of its connecting lines, from which connecting line it was to receive the flour. The evidence shows that the employees of that railroad company had struck for higher wages, and had ceased to work for the railroad company; that they had refused to work, and by violence prevented other employees from working for the company. The evidence shows that, after the company had succeeded in employing new hands, obstructions were put upon the tracks and trains derailed and bridges burned, and that in some instances the new hands were fired upon by the strikers, and some of them killed. The evidence further shows that it was an organized resistance by the strikers, and that the company called upon the civil authorities to protect its property and franchises against this armed resistance, and that the civil authorities were unable to do so. It further shows that the company exerted all its power to employ other hands, and to run its trains, but that it could not do so, on account of this armed resistance. Under this state of facts the jury returned a verdict in favor of the defendant; and, as we have before said, we think the verdict was right. The law seems to be that where a railroad company receives freight for shipment, and its employees strike or cease to work for the company, the company is still bound to forward the freight within a reasonable time; but if this strike is accompanied with violence and intimidation, so as to render it unsafe to forward the freight, the company is thereby relieved from liability for delay in the delivery of the freight. The company is bound at all hazards to deliver freight safely, except in cases of the act of God or of the public enemy. It therefore ought to be allowed to plead and prove the acts of violence and armed and organized resistance of its former employees, especially when the resistance is of such a character as could not be overcome by the company, or controlled by the civil authorities when called upon by it. Geismer *v.* Railway Co., 102 N. Y. 563, and cases there cited.

Liability of company in case of strike.

2. We think the verdict was right for another reason. Haas did not show what was the amount of the draft drawn on him by Ayres, nor the amount received from the flour. He simply alleges in his declaration, that he lost $163 by the delay in the arrival of the flour and the decrease in its price. So far as this record discloses, the flour may have been sold for enough to pay the draft. This loss on the flour may have been the profits he anticipated making. But if the proceeds of the flour were sufficient to pay the amount of

Failure to show damage.

the draft advanced upon the faith of it, then he was not damaged, and could not recover in this action.

3. Whether the above propositions are correct or not, we still think the verdict was right for another reason. The record does not show that this bill of lading was assigned or indorsed by Ayres to Haas. This being true, Haas, under our Code, could not bring suit on the contract made between the railroad company and Ayres. It is true that after the argument in this case was concluded, and after we had devoted at least half a day to its further consideration, we were informed that the bill of lading had been assigned and indorsed by Ayres to Haas, and that the clerk had made a mistake in not copying the indorsement in the record. It is the duty of counsel to examine the records sent here from the courts below, and to ascertain if any mistakes have been made in copying the original documents, and, if such mistakes have been made, to suggest a diminution of the record, on or before the calling of the case in this court. It is too late after the case has been argued here, and after this court has spent hours in the investigation of the law of the case, to suggest mistakes in the record. Even if the record showed that the bill of lading had been assigned and indorsed by Ayres to Haas, we would still hold that the verdict was right in this case. A bill of lading if not such a negotiable instrument as to give the assignee any other or greater rights than the assignor had. The assignee has only such rights as Ayres would have had. "Bills of lading are symbolic of the property they represent, and, though transferable so as to pass title to the property in a transaction intended to have that effect, are not, in the full commercial sense, negotiable paper, and are not attended with all the incidents of such paper in favor of *bona fide* purchasers." Tison *v.* Howard, 57 Ga. 410; Shaw *v.* Railroad Co., 101 U. S. 557. Haas says in his testimony that, when he bought this flour, he thought it was on the line of the defendant's road; whereas, in truth, it was not on that line, but on the line of one of its connecting roads, and this connecting road was the one on which the strike occurred which delayed the flour; that, if he had known it was not on the defendant's line of road, he would not have purchased it. The evidence shows that Ayres, from whom Haas received the bill of lading, knew when he got the bill of lading from the company that the flour was not on the line of its road, but on this connecting line; and Ayres having received the bill of lading with knowledge that it was not in possession of the defendant, but on the connecting line of road, he could not recover damages from the defendant for delay in the delivery of the flour, if the connecting line was prevented from shipping it by the acts of an armed mob. For these reasons we affirm the

Suit by consignee—Indorsement of bill.

judgment of the court below in overruling the motion for a new trial. Judgment affirmed.

Carriers of Goods—Delay in Delivery.—See, *ante*, Merchants' Despatch Tr. Co. *v.* Hately, 565, and note, 571.

Same—Measure of Damages.—The measure of damages for an unreasonable delay in the transportation and delivery of goods where no time is specified is the difference in the diminished market value of such goods at the time and place of destination, when and where they should have been delivered and when they were delivered, with interest. St. Louis R. Co. *v.* Mudford, 48 Ark. 502; s. c., 32 Am. & Eng. R. R. Cas. 539; Columbus & W. R. Co. *v.* Flourney, 75 Ga. 745; Illinois Cent. R. Co. *v.* Cobb, 72 Ga. 148; Galena & C. U. R. Co. *v.* Rowe, 18 Ill. 488; Evansville & T. H. R. Co. *v.* Montgomery, 85 Ind. 494; s. c., 9 Am. & Eng. R. R. Cas. 195; Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623; Cutting *v.* Grand Trunk R. Co., 95 Mass. (13 Allen) 381; Detroit & B. C. R. Co. *v.* McKenzie, 43 Mich. 209; Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489; Rankin *v.* Pacific R. Co., 55 Mo. 167; Faulkner *v.* Southern Pac. R. Co., 51 Mo., 311; Ward *v.* New York Cent. R. Co., 47 N. Y. 29; Lindley *v.* Richmond & D. R. Co., 88 N. C. 547; s. c., 9 Am. & Eng. R. R. Cas. 31; Louisville & M. R. Co. *v.* Mason, 11 Lea (Tenn.), 116; s. c. 16 Am. & Eng. R. R. Cas. 241; Newell *v.* Smith, 49 Vt. 255; Peete *v.* Chicago & N. W. R. Co., 20 Wis. 594. See, *post*, Ayres *v.* Chicago & N. Y. R. Co., and note; and also, Pacific Express Co. *v.* Darnell, 32 Am. & Eng. R. R. Cas. 543.

Same—Sale at Fixed Price.—Where goods are contracted to be sold at the fixed price to be delivered at the particular place, and a carrier undertakes to transport and deliver them in due time, with full notice that the goods are sold, if forwarded seasonably, the measure of damages for the breach of the contract to carry by which the consignor loses the same is said to be the difference between the contract and the value of the goods when actually delivered. Deming *v.* Grand Trunk R. Co., 48 N. H. 455. In such a case the contract price should always be taken as the basis for estimating the damages, otherwise the market price at the place of delivery at the time when the grain should have reached there. Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58.

The carrier is chargeable with notice that the article carried is intended for market, and unreasonable delays in its delivery, and where there is a depression in the market value of the article at the place of consignment between the time it ought to have been delivered and the time it was in fact delivered, such depression will ordinarily constitute the measure of damages. See authorities first cited in this note, and Devereaux, Receiver, *v.* Buckley, 34 Ohio St. 16; s. c., 21 Am. Ry. Rep. 72.

Same—Strikes, Riots, and Mobs.—The earlier cases held that the existence of a strike, riot, or mob did not relieve a common carrier from damages for delay in transportation or delivery. See Blackstock *v.* New York & E. R. Co., 20 N. Y. 48; s. c., 1 Bosw. (N. Y.) 77. But it may not be said to be a settled doctrine that a railroad company is not responsible for delay in carriage caused by mobs, or the unlawful conduct of railroad employees in refusing to do their duty. See Pittsburgh, F. W. & C. R. Co. *v.* Hazen, 84 Ill. 36; s. c., 16 Am. Ry. Rep. 422; Little *v.* Fargo, 43 Hun (N. Y.), 233; Geismer *v.* Lake Shore & S. M. R. Co., 102 N. Y. 563; s. c., 55 Am. Rep. 837; Hamilton *v.* Western C. R. Co., 96 N. C. 398. *Compare* White *v.* Missouri Pac. R. Co., 19 Mo. App. 400.

Same—Boycotting.—As to the duty of connecting lines to receive and transport goods and cars and passengers from boycotted roads, see, *post*, Biers *v.* Wabash, St. Louis & Pacific R. Co., and note.

WAITE *et al.*

v.

NEW YORK CENTRAL AND HUDSON RIVER R. CO.

(110 *New York*, 635.)

Carriers of Goods—Delay in Delivery—Negligence.—Proof that a railroad company received a car-load of freight from a connecting railroad, in which was a boiler shipped and way-billed to a point upon its line, the rest of the car-load being through freight; that it had due notice of the shipping and the destination of the boiler, and of the transfer of the contents of the car of the connecting line in which it was first loaded on a car of its own line, and that it sent such car beyond its line to the destination of the through freight which it contained, without opening it, or looking for the boiler, is sufficient to sustain a verdict against the railroad company for damages caused by its negligent delay in delivering the boiler.

Same—Pleading—Evidence.—Where the complaint in an action against a railroad company for delay in delivering freight consigned to plaintiff, states that defendant is a common carrier and that delay was caused by its negligence as such, and the answer denies such negligence, and the proof goes largely to the question of negligence, defendant cannot object to the action of the court in excluding from the jury the question of an express contract between the parties, and submitting the case wholly upon the question of negligence on the ground of surprise.

Same—Connecting Lines—Letters from Agents.—Defendant railway company cannot introduce in evidence letters written to its agents by agents of a connecting railroad regarding a mistake theretofore committed in transporting freight received from such connecting railroad, thereby causing a delay in delivery for which plaintiffs seeks damages.

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of plaintiff, entered upon a verdict. The opinion states the case.

C. D. Prescott for appellant.

Hadley Jones for respondents.

FINCH, J.—This action was brought to recover damages for delay in the delivery of a boiler shipped to the plaintiffs from Boston. Their recovery, which was sustained by the general term, is resisted here mainly upon two grounds.

Grounds for resisting recovery.

It is claimed that the action was upon an express contract; that whether such contract did or did not exist was the point in controversy; that, at the close of the evidence, the court ruled that no contract had been established; and then for the first time put the case upon the ground of the defendant's duty as a carrier, and submitted to the jury the question of negligence in

the performance of that duty. It is added that the defendant corporation was not prepared, and had no opportunity, to contest that new issue, and it was error to introduce it into the controversy. The history of the trial does not sustain this contention. The complaint explicitly alleged that the defendant was a common carrier, and "so negligently and carelessly conducted" and "so misbehaved in its calling as a common carrier" as to have occasioned the delay and injury which the plaintiffs suffered. The answer not only denies the negligence alleged, but avers that the delay was due to the careless and negligent conduct of the Boston & Albany R. Co., over whose line the property was transported from Boston, and by whom it was delivered to the defendant, to be further carried over its road to Little Falls. Very early in the trial, and before the evidence had at all developed the facts, the defendant's counsel, in objecting to a question put, declared: "This is simply a question between these two roads as to who made the mistake." As the trial proceeded the plaintiff's proofs were devoted almost entirely to the question of the defendant's negligence as a carrier; and among the plentiful objections taken, no one was put upon the ground that no such issue was fairly involved in the case. When the inquiry as to damages was reached, the defendant's counsel interposed, and moved for a nonsuit on the general ground that no cause of action was proved, and renewed that motion at the close of the evidence upon the ground—First, that no contract had been established; and, second, "that in an action like this, for a delay merely in the delivery of freight the ordinary rule in regard to being insurers as against everything but the act of God and the public enemy does not pertain, and any excuse which shows that they employed reasonable diligence is all that is necessary." And when, in answer to that motion, the court held in defendant's favor in respect to a contract, but submitted the question of negligence to the jury, the counsel for the railroad company excepted because no negligence had been proved, and upon the whole evidence could not be said to exist. Upon these facts it is entirely clear that the defendant was in no respect surprised or misled, and has no just reason to complain of the action of the court.

Delay in delivery—Negligence—Pleading and proof.

The next contention is that, upon the facts, the defendant was shown to have exercised reasonable care, and was not chargeable with negligence. I think that was quite certainly a question for the jury. The way-bill of the property reached the agent of the Boston & Albany road at its terminus in East Albany on the 11th of September, and on that day was sent by messenger to the agent of the defendant, who thereafter forwarded it to the

Facts constituting negligence.

freight agent at Little Falls, who received it the next day. That way-bill, dated September 10th, was "of merchandise from Boston to Little Falls," specified the car as "B. & A. 2390," named the plaintiffs as consignees, described the property as machinery, and fixed the amount of freight chargeable by each road. The property arrived on September 13th, and was by the Boston & Albany agents unloaded from car 2390, together with some other machinery consigned to East St. Louis, and transferred to defendant's car numbered 20,126. That car was taken across the bridge, and to West Albany, and there taken out of the train, and held for want of a conductor's slip, or other evidence of its destination. On the 14th or 15th of September, Ingraham, who represented the Boston & Albany, sent to J. J. Jones, the dispatch agent of the defendant, a notice which is in this form: "2390, B. & A., Boston, to E. St. Louis, 10, transf'd to 20,126, N. Y. C." So that, before the machinery left West Albany, the defendant knew that it had been sent from Boston on car 2390, had arrived at East Albany, had been transferred to car 20,126, and was waiting at West Albany for further direction; or, if the defendant did not know all these facts, its agents had full means of knowledge in their possession, or spread upon their records, and it was their business to know, and not carelessly and without examination send car 20,126 to East St Louis loaded in part with the freight which should have stopped at Little Falls. It may be that the Boston & Albany road was partly in fault for the mistake, but it was fairly a question for the jury whether the defendant was not negligent in shutting its eyes to its own means of knowledge, which it was its duty and business to utilize and employ. If the system of transfers adopted admits of such mistakes, both roads should reorganize the system.

Evidence—Letters written after delay.

A further exception is argued, growing out of the refusal by the court to admit in evidence certain letters written by the agents of the Boston & Albany in answer to letters from the agents of the defendant. This correspondence is among the exhibits attached to the case. The first letter of Ingraham was dated October 17th, and the second October 27th. Both were written long after the mistake had occurred,—the first on the day the property finally reached Little Falls, and the second 10 days later; and both were the unsworn statements narrative of a past occurrence of the agents of the Boston & Albany road, which last was not a party to the action. They were not admissible; but, if they had been, they would have been badly damaging to the defendant, for not only do they tend to fasten the charge of negligence upon the defendant, but do it so forcibly and with so much reason that, at the close of the correspondence, their offer to

bear a part of the loss seems at least liberal and fair. Several objections were taken to the admission and rejection of evidence, and to the charge of the court, but do not seem to us well founded. The judgment should be affirmed, with costs.

All concur.

Carriers—Delay in Transportation.—In Erie & Pacific Despatch *v.* Stanley, 14 N. E. Rep. 212, in Illinois supreme court, it was held that in a suit against a common carrier for injury to lemons, caused by delay in transportation, where the case had been tried upon the theory that defendant was responsible for the decay of the lemons, if its delay and want of care in transportation had caused such decay, and the defendant had closed its testimony, the calling by the plaintiff of the defendant's contracting agent, who had already testified for the defence, and exhibiting to him a duplicate of the bill of lading for the goods, merely for the purpose of refreshing his memory, as to the date and place of shipment, did not authorize defendant on cross-examination, to show by the bill of lading that the risk of injury to the lemons, by reason of decay during the transportation, was expressly assumed by the shippers, that theory not having been set up in the pleadings, nor suggested in any of the evidence before the cross-examination was proposed.

Carriers of Goods—Delay in Delivery.—For a full discussion of the subject of the liability of railroad companies and other common carriers for delay in transportation and delivery of goods and the measure of damages for such delays, see, *ante*, Merchants' Despatch Tr. Co. *v.* Hatley, 565, and note, 571; and Haas *v.* Kansas City, Ft. S. & G. R. Co., 572, and note, 575.

Same—Negligence.—It is held in the case of Ruthvan Woollen Co. *v.* Swesta S. Co., 18 Up. Can. C. P. 316, that where machinery is being shipped for a special purpose, notice of that fact should be given in order to hold the carrier liable for special damages for delay in transportation and delivery. And see also, as to this point, Pacific Express Co. *v.* Darnell, 32 Am. & Eng. R. R. Cas. 543.

BLOCK

v.

MERCHANTS' DESPATCH TRANSPORTATION CO.

(*Tennessee Supreme Court, February* 9, 1888.)

Common Carrier—Limiting Liability—Damage for Loss.—A stipulation in a bill of lading by a transportation company that it will not be liable for loss of the goods received by it for transportation, but that the owner shall look for damages to the railroad over which the property is shipped, is void, and cannot relieve the transportation company from liability for loss or injury; for it is a common carrier, with liabilities as such, and the railroad company over whose line it shipped its freight is nothing more than its agent.

Same—Bill of Lading—Instruction.—Where a carrier pleads, as a defence to an action for loss or injury to freight, a stipulation exempting it from liability, an erroneous instruction as to what is essential in the bill of lading to constitute it a contract, is immaterial after an instruction that the stipulation in the bill of lading relied upon as a complete offence, is void, because unreasonable and against public policy.

ERROR to review a judgment in favor of plaintiff in an action against a transportation company for the value of freight lost in transportation. The opinion states the case.

Rice & Bell for plaintiff in error.

Smith & Allison for defendant in error.

CALDWELL, J.—This action was brought in the circuit court of Davidson county by Block Bros. against the Merchants' Despatch Transportation Co. as a common carrier, to recover the value of a certain case of merchandise. Verdict and judgment were for the plaintiffs, and the defendant has appealed in error. The goods were received by the defendant in the City of New York, under contract to deliver to the plaintiffs at Clarksville, Tennessee, for a stipulated sum. They were transported to Louisville, Kentucky, over several lines of railroad, in a car belonging to the defendant, and at that point they were delivered to the Louisville & Nashville R. Co. for transportation to point of destination. The goods were never delivered at Clarksville, but where lost by the Louisville & Nashville Co. in some manner, and at some time and place not shown. The shipment was made under the following receipt and bill of lading:

Facts.

"NEW YORK, March 18, 1882.

"Rec'd from E. S. Taffray & Co., in apparent good order, the following package marked as in the margin, viz.: 282. Block Bros., Clarksville, Tenn. One case Mdse. Bill of lading from New York to Clarksville, of first-class goods; 96 cts. per 100 lbs. To be forwarded to Clarksville under the following conditions: It being expressly understood and agreed that in consideration of issuing this through bill of lading and guaranteeing a through rate the Merchants' Despatch Transportation Co. reserves the right to forward said goods by any railroad line between point of shipment and destination. . . . It is further stipulated and agreed that in case of any loss, detriment, or damage done or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the happening thereof. . . .

[Signed] MCGEAGEN, Agent."

The contention of the defendant in the court below was that these stipulations in the bill of lading relieved it from liability for the loss of plaintiffs' goods; and the trial judge's charge with respect thereto is now assailed as erroneous. The court charged that the latter of these stipulations was "rendered void" by the former; that by the former reserving to the defendant "the right to forward said goods by any railroad line between point of shipment and destination," the defendant made such railroad line its agents, and that "the law, on grounds of public policy, would not allow it to stipulate exemption from liability for the consequences of the negligence of its agents, or their failure to do their duty." This instruction properly treats the defendant as a common carrier. The duties which it undertakes, and which it holds itself out to the public as willing to undertake and perform, give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others, such has been assumed to be its character, without a discussion of the question. We cite a few of these cases: Transportation Co. *v.* Cornforth, 3 Colo. 280 (25 Am. Rep. 757); Robinson *v.* Transportation Co., 45 Iowa, 470; Stewart *v.* Transportation Co., 47 Iowa, 229; Wilde *v.* Transportation Co., Id. 247; Bancroft *v.* Transportation Co., Id. 262; Transportation Co. *v.* Bolles, 80 Ill. 473; Transportation Co. *v.* Leysor, 89 Ill. 43; Transporation Co. *v.* Joesting, Id. 152. The writers say that despatch companies are common carriers, and class them with express companies because of the many points of similarity in their business, and the fact that they alike generally use the vehicles of others in the transportation of freight. No law is more familiar in England or America than that which binds the common carrier to safely deliver to the consignee goods intrusted to it for transportation, unless prevented from so doing by the act of God or public enemy. But in the last half of a century it has become equally well settled that the common law liability of a common carrier may be limited in its extent by express contract for that purpose. This right of the carrier to limit its responsibility has been recognized by the supreme court of the United States, since the decision, by that court, in 1847, of the case of Navigation Co. *v.* Bank, 6 How. 344, and so far as we are informed it is now upheld in every State in the Union. To be valid, however, the limitation must in all cases be reasonable; and to be reasonable, it must not stipulate for exemption from liability for the consequences of the negligence of the carrier, its servants or agents. Railroad Co. *v.* Lockwood, 17 Wall. 357–384; Coward *v.* Railroad Co., 16 Lea, 225; Dillard *v.* Railroad Co., 2 Lea, 288; Marr *v.* Telegraph Co., 1 Pickle, 529.

Transportation company a common carrier.

Carriers' limitation of liability.

Same—Instructions—Railroad as agents of despatch company.

In the case before us the defendant insists that by the stipulation in the bill of lading it is relieved from responsibility for the loss of plaintiffs' goods. We have already seen that the defendant, in the bill of lading, first reserved to itself the right of selecting the particular line of railroad over which it should transport the goods, and left the shippers or owners no choice or discretion in that matter. This discretion, the trial judge told the jury, constituted such railroad lines, when selected, the agents of the defendant. Following this is the other stipulation that the company alone upon whose line the goods might be lost or injured should be liable therefor. This, the trial judge told the jury, was invalid, because it exempted the defendant from liability for the negligence of those agents. If the first of these two propositions laid down by the trial judge be true, the other would be sure to follow; that is to say, if the railroad lines over which the goods were transported were the agents of the defendant, then its stipulation against its responsibility for the negligence of those agents would be invalid. For it has been seen that a common carrier cannot lawfully contract against the consequences of its own negligence, and, upon familiar principles, it can no more contract against the consequences of the negligence of its agents, because their negligence is, in law, its negligence.

Facts to show agency.

The contract of shipment was made by the defendant in its own behalf for the whole route, and not on behalf of others or for a part of the route only. For a specified sum, to be paid to it for the whole service, the defendant promised through transportation from New York to Clarksville, receiving the goods in its own name at point of shipment, and binding itself to deliver them at point of destination. It did not own or claim to own a single line of railroad, though several were to be used in the performance of its contract. It was compelled to rely upon others for the carriage of its freight, and, for its own benefit, and not for the benefit of the shippers, or consignees, it reserved to itself the selection of the lines it would use; the reservation necessarily embracing the privilege on the part of the defendant making its own arrangements as to terms, with such lines, and carrying with it the duty of paying them for their services. Such we regard as a proper interpretation of the bill of lading, down to and including the first stipulation. It shows the railroad lines engaged in the transportation of the goods sued for to have acted for the defendant, and justifies the instruction that those lines were, in this litigation, to be treated as the agents of the defendant. The facts disclosed in the proof before the jury are entirely in harmony with this interpretation of the bill of lading, and justify the conclusion of law. The goods were conveyed to Louisville

in defendant's own car, and Louisville is by one of defendant's witnesses called the terminus of the line; but the manifest meaning of the witness, and the truth of the matter, is simply that defendant's car was transported to Louisville over railroad lines owned and operated by others with whom it had contracted, and that its car stopped at that point. At Louisville the defendant engaged the Louisville & Nashville R. Co. to convey the goods thence to their destination to complete its contract for it. This engagement, as to others, the defendant made on its own behalf, upon its own responsibility, and in full recognition of its undertaking and duty to deliver the goods at Clarksville. The nature of this engagement, and its appreciation of the import of this duty, is best shown by the language of defendant's agent and witness. He says: "Defendant had to forward these goods as any other shipper, and it had to pay whatever the Louisville & Nashville R. Co. would charge, even if it had been the entire amount received from the shippers."

Despatch and express companies not exempt from ordinary liabilities of carriers.

Despatch companies and express companies have, since the earliest years of their existence, endeavored to put themselves without the rules applicable to common carriers, and to shield themselves against responsibility for the acts and omissions of other carriers whose conveyances they habitually use in the performance of their own contracts. Their efforts in this direction have been uniformly unsuccessful, because regarded by the courts as contrary to public policy. "It has been attempted," says Mr. Lawson, "on the part of express, forwarding, and despatch companies to evade the responsibility of common carriers, on the ground that they are not the owners of the vehicles employed in the transportation; but this pretence has not been permitted in the courts. The names which they assume are regarded as immaterial; the duties which they undertake being the criterion of their liability. They are, therefore, held, to the resposibility of common carriers, both when they are and when they are not interested in the conveyances by which the goods are transported. If an express company engaged to transport goods sends them by a railroad company employed by it to perform the service, the railroad company becomes the agent of the express company, and the latter is liable to the consignor for its acts." Lawson, Cont. § 233. Mr. Hutchinson, speaking on the same subject, says: "Because of this peculiarity in the employment of the means of conveyance afforded by others, the contention has been made by these companies that they were not common carriers, but transacted their business in the character of forwarders, and were not therefore liable for losses occurring from the negligence of those whom they thus employed. But this claim to exemption from the

ordinary liabilities of common carriers has not been sustained by the courts. Those subsidiary means of transportation have been held to be the mere agencies employed by such companies for whose acts they are strictly responsible; and the carrier whose vehicle is thus used becomes likewise liable, upon principles of agency, to the owner of the goods, according to the terms of his contract with his employer." Hutch. Carr. § 70. The latter author, in the language just quoted, has reference to express companies; but in the second section following he says the same rules are applicable to despatch companies, in the same manner and for the same reasons. Then he says: "Other carriers, under the name of despatch companies, fast freight lines, and the like, have also come into existence, and conduct their business upon the same principle as express companies, that is, by the employment of the means of transportation furnished them by others, and to which for some reasons the same rigid rule of responsibility as common carriers is applied." Hutch. Carr. § 72. One of the earlier leading cases on this subject was decided by the supreme court of Massachusetts in 1867. The defendants there were express companies. Chief Justice Bigelow, in delivering the opinion of the court, said: "But it is urged in behalf of the defendants, that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers, over railroad and by steamboat, cannot from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them, nor subject to their direction or supervision; and that the rules of the common law, regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles, and to exercise a personal care and oversight of them, are wholly inapplicable to the contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignee of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is

made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfilment of their undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are to be carried by land or water, by the carrier himself, or by agents employed by him. The contract does not imply a personal trust which can be executed only by the contracting party himself, or, under his supervision, by agents and means of transportation directly and absolutely within his control. . . . The truth is that the particular mode or agency by which the services are to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him." Buckland *v.* Express Co., 97 Mass. 126–130.

Some 10 years later Justice Strong delivered a very instructive opinion on the same general subject. He said: "The exception or restriction to the common-law liability introduced into the bills of lading by the defendants, so far as it is necessary to consider it, is that the express companies are not liable in any manner, or to any extent, for any loss or damage or detention of such package or its contents, or any portion thereof, occasioned by fire. The language is very broad; but it must be construed reasonably, and, if possible, consistently with the law. If construed literally, the exception extends to all loss by fire, no matter how occasioned,—whether occurring accidentally, or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful acts of the carriers themselves. That it can be operative to such an extent is not claimed. Nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct, or that of their servants and agents. But the circuit court ruled the exception did extend to negligence beyond the carriers' own line, and that of the servants and agents appointed by them and under their control,—that it extended to losses by fire resulting from carelessness of a railroad company employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was that the railroad company and its employees were not under the control of the defendants. With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody,—

Same—Justice Strong's opinion.

either of the express company, or of the shippers or consignors of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employees. It is true, the defendants had also no control over the company or its servants, but they were its employees; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service, and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate to him, and not to one who neither employs it, nor pays it, nor has any right to interfere with it. If, then, the Louisville & Nashville R. Co. was acting for these defendants, and performing a service for them when transporting the packages they had undertaken to convey, as we think must be conceded, it would seem it must be considered their agent. And why is not the reason of the rule that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of Railroad Co. *v.* Lockwood (17 Wall. 357?). The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at disadvantage. It tends to induce greater care and watchfulness in those to whom the owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriers more unreliable. This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically he has; but most frequently when the negligence of his servant

occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be. For these reasons we think it not advisable to construe the exceptions in the defendants' bill of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed." Bank *v.* Express Co., 93 U. S. 181–183.

This latter decision, which we regard eminently sound in reason and in law, lays down the doctrine that controls the case before us. There the undertaking of the express companies was to carry certain money from New Orleans, Louisiana, to Louisville, Kentucky, and deliver it to a certain broker in the latter city. The express messenger placed the packages of money in an iron safe, and the latter in the express car, for transportation to destination. Thus situated, the money was transported over different lines of railroad, and while being carried over the Louisville & Nashville Company's line a trestle gave way, in the night-time, precipitating the express car, which was then burned, together with the money. The express messenger who accompanied the money was rendered insensible by the fall and continued so until the destruction was complete. Thereafter the broker sued the express companies in the United States circuit court, for the loss of the money. To these suits the express companies interposed the stipulation against liability for the loss caused by fire contained in their bills of lading as a complete defence. The court charged the jury that such stipulation relieved the defendants from the loss, if they and their messenger were without fault or neglect; and further, that it was not material to inquire whether or not the accident resulted from the negligence of the railroad company and its agents. In other words, the instruction was that the defendants were liable for the consequences of their own negligence only, and not for a loss brought about by the negligence of the railroad company. That instruction was disapproved, and the contrary doctrine announced in the language we have quoted somewhat at length. There the contract was for through transportation, in which the defendants were obliged to use the vehicles and railroad lines of others; so it is here. There the defendants made their own employment of the railroad companies, and paid them for their services; so it is here. There the defendants produced a special contract,

Bank v. Express Co. examined.

and by reason of it claimed that they were not liable for a loss proceeding from the negligence of the railroad company; and so it is in the case before us. There the railroad company was held to be the agent of the defendants, and for the consequences of its negligence they were adjudged to be liable. We so hold and adjudge here. A similar question was made before the supreme court of Illinois in 1879. Goods intrusted to an express company for transportation were destroyed by fire while in transit upon a railroad. The court said: "But admitting the conditions in the receipt were understandingly assented to by the shippers, and became a binding contract between the parties, still defendants would be liable for the full value of the goods if the loss was owing to the negligence on the part of the railroad company. An express company choosing such a corporation to do its business, will be chargeable to the same extent for the negligence of the agent employed, as if the contract was primarily with such agent, on the well-recognized principle that for culpable defects in carriages used by common carriers the law makes the carrier responsible." Boscowitz *v.* Express Co., 34 Am. Rep. 197, 93 Ill. 523. To the same effect is Christenson *v.* Express Co., 15 Minn. 270 (Gil. 208.). See also Transportation Co. *v.* Oil Co., 63 Pa. St. 14.

Express and despatch companies classed together.

It is to be observed that all these decisions from which we have made quotations were made in cases against express companies, whose messengers accompany their freight, and not in cases against dispatch companies, which have no such messenger; but the doctrine therein announced, as we understand it, is not made to depend in any sense upon the presence of the messenger. The holding is that the express company is responsible for the negligence of the other carrier upon whose line the loss or damage may occur, not because the messenger is with the goods at the time, but because the other carrier is the agent of the express company. Express companies and dispatch companies alike use the conveyances of others in the performance of their respective contracts with their respective customers; and they have precisely the same relation to those whose conveyances they so use. It is in this view that we regard those decisions applicable in this case; and it is for this reason just stated that the text-writers class express companies and despatch companies together.

Case not like ordinary shipment over several lines.

This is not like the case of a shipment over several connecting lines of railroad, when the company first receiving the goods makes the contract for itself and others, and stipulates that liability shall fall alone upon the particular line in whose custody the goods may be when loss, if any, may be suffered. There the company first receiving the goods is in fact and

by the contract a common carrier for only a part of the route—to the end of its own line. Here the defendant is in fact and by the contract a common carrier for the whole route from point of shipment to destination. There that company limits itself to the faithful performance of duty as a common carrier only while the goods may remain upon its line and until delivered to the one next succeeding. To that extent, and for that distance, but no farther, does it hold itself out to the consignor as a common carrier. For the balance of the route it acts only as agent of the other lines. Here the defendant holds itself out to the consignors as a common carrier for the whole route; and in its own name, and for itself, as principal and not as agent of any one, contracts to furnish the necessary means of transportation upon every part of the entire journey. The duty of transportation is divided into several parts, and each company stands as an independent carrier, bound only for safe carriage over its own line and prompt delivery to the next in succession or to the consignees; but it is released from liability only while the goods may be in custody of other lines. Here the defendant undertakes the whole transportation upon its own responsibility; and owning no railroad itself for any part of the route, it employs such lines of others as it sees fit to use. In making the contract with the consignors, it acts for itself alone; and in making the necessary sub-contracts with such railroad lines as it chooses to employ for assistance in the performance of its undertaking with the consignor, it again acts for itself, and no one else. And though it thus assumes for itself the duty of through transportation, and selects its own agencies, it nevertheless attempts to exempt itself absolutely from all accountability for any loss that may occur during any part of the entire transit.

Here the company first receiving the goods and making the contract for itself and other companies, leaves each answerable, under the law, for any loss upon its own line, the same as if no special contract were made, and stipulates only for exemption from liability for loss upon other lines—a liability which it could not in any event be compelled to assume against its will. Here the defendant leaves itself accountable for no loss whatever which may happen on any part of the journey; but, by throwing the whole burden upon the railroad lines, its agents, it seeks to relieve itself absolutely from even a possibility of responsibility on its own part for any loss on any line. If loss be occasioned upon the first line, or upon the last line, or upon any intermediate line, the result is the same to the defendant—it has positive exemption from accountability in each and every instance, if its stipulation be sustained. It assumes the duty and receives the compensation of a common carrier, but tries to

throw off all responsibility attaching to that relation and character. There the contract is reasonable, and therefore lawful; here it is unreasonable, and therefore unlawful.

Manifestly, no one of several connecting lines of railroad would be permitted to contract against accountability for a loss upon its own line; and for the same obvious reasons, this defendant, which makes such lines its agents and its own for the purposes of this transportation as between it and the owner of the goods, should not be allowed to protect itself behind the stipulation presented in this case. Otherwise, all common carriers, in the law, which use the conveyances of others in the transportation of their freight and performance of their contracts with their customers, may, by agreement, completely annihilate their common-carrier liability and revolutionize the wholesome rule of law hitherto prevailing upon that subject.

Right of connecting roads to limit their liability—Contract for through carriage.

Owing to the vast scope and importance of the subject, the courts and text-writers have devoted much time and space to the discussion of the power and right of connecting railroad companies to limit and extend their common-law liability as common carriers within and beyond the *termini* of their respective lines. All authorities are now agreed, we believe, in holding that the first of a number of successive companies rendering service in the carriage of freight between distant points may so bind itself to deliver goods beyond the terminus of its own line as to become responsible for their safe carriage through the entire journey. But with respect to what is necessary to constitute such a contract, the English and American authorities are quite inharmonious. The English rule is that the receipt of goods marked for a given point, without a positive limitation of responsibility, affords *prima facie* evidence of an undertaking on the part of the carrier to safely transport them to their destination, whether within or beyond the limits of its own line; while in America, most of the courts regard each company as liable in the common-carrier capacity only for the extent of its own line, unless there be a special contract to the contrary. The latter may be stated to be the American rule, though some of the States, Tennessee among the number, have adopted the English rule as more consonant with sound reason and public policy. Schouler Bailm. (Ed. 1887) §§ 593–598, inclusive; Lawson, Cont. §§ 235–240, inclusive; Redf. Carr. §§ 190–197; Hutch. Carr. §§ 145–149, 151, 152; Railroad Co. *v.* Campbell, 7 Heisk. 253; Railroad Co. *v.* Rogers, 6 Heisk. 143; Railroad Co. *v.* McElwee, 6 Heisk. 208; Railroad Co. *v.* Weaver, 9 Lea, 38. It is likewise well settled that a common carrier is not bound in law to transport goods beyond its terminus, and that it may therefore lawfully stipulate that it shall not be liable for loss after the

goods have passed beyond the limits of its own line and upon the line of another. Schouler Bailm. § 603; Lawson Cont. § 236; Railroad Co. *v.* Brumley, 5 Lea, 401; Dillard *v.* Railroad Co., 2 Lea, 288; Railroad Co. *v.* Holloway, 9 Baxt. 188; Railroad Co. *v.* Campbell, 7 Heisk. 257. But it is readily seen that this case is not controlled by either of those doctrines. It is not the case of a limitation of liability to the line of the contracting carrier, nor of an extension of responsibility beyond the limits of that line; on the contrary, it is the case of a carrier for the whole route attempting to relieve itself from liability upon any part thereof because it has no conveyance of its own and is compelled to use those of others in the performance of its contract of shipment. Declining to lend our assistance or approval to such an effort, we hold that the defendant, notwithstanding its stipulation, is responsible for the consequences of the negligence, if any, of the railroad companies which it employed in the transportation of the goods sued for, such companies being, to all intents and purposes, its servants or agents as between it and the plaintiff. There is no positive proof that the loss resulted from the negligence of any one. But such proof is not necessary to entitle plaintiff to a recovery; for "When goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he was not responsible." Lawson Cont. § 245; Hutch. Carr. § 769; Schouler Bailm. § 439; Railroad Co. *v.* Holloway, 9 Baxt. 188; Dillard *v.* Railroad Co., 2 Lea, 296; Transportation Co. *v.* Oil Co., 63 Pa. St. 14.

Bill of lading —What necessary to constitute.

The defendant assigns, as additional error, the action of the court below in giving to the jury certain instructions and in refusing certain requests for instructions with respect to what was necessary to constitute the bill of lading a contract between the parties. Referring to the bill of lading, and the stipulation therein, which we have already quoted and considered, his honor the trial judge to the jury said: "It is not a contract between the parties unless you find that there is evidence establishing that plaintiffs agreed to that stipulation. Before the stipulation in the bill of lading would be binding on the plaintiffs, it would be necessary for the defendant to show that plaintiffs' attention had been called to it, and that they expressly or impliedly assented to it; the fact that they accepted the bill of lading from the defendant, kept possession of it without objection, and introduced it in evidence, would not be sufficient, in my opinion." This charge is in accord with the uniform holding of the supreme court of Illinois, which requires the carrier to show affirmatively that the restrictions of liability claimed by it were in fact known and assented to by the

shipper (Boscowitz *v.* Express Co., 93 Ill. 523; Field *v.* Railroad Co., 71 Ill. 458; Express Co. *v.* Haynes, 42 Ill. 89); but it is contrary to the great weight of American and English decisions, which hold that the fair and honest acceptance of a bill of lading without dissent raises a presumption that all limitations contained therein were brought to the kowledge of the shipper, and agreed to by him. 3 Wood R. Law, note 2, pp. 1577, 1578; Lawson Cont. § 102; Hutch. Carr. § 239; Shouler Bailm. §§ 464, 465; Railroad *v.* Brumbey, 5 Lea, 404; Dillard *v.* Railroad Co., 2 Lea, 294. The request for instructions were in substantial conformity to the rule as announced by this court in the last two cases mentioned. This action of the court in giving the jury improper instruction upon the one hand and in refusing to give proper instruction upon the other would ordinarily be fatal and afford ground for reversal; but it is not so in this case, because the error is immaterial. The matter in hand was the stipulation through which the defendant sought to protect itself against liability. It has already been seen that the court was right in telling the jury that such stipulation, though contained in the contract, was invalid because unreasonable and against public policy. Therefore, any error with reference to what was necessary to make it a contract was clearly immaterial. Being immaterial, a reversal cannot be predicated upon it. Myers *v.* Bank, 3 Head, 331; Redmont *v.* Bowles, 5 Sneed, 547; Patterson *v.* Head, 1 Lea, 664.

Affirmed.

FOLKES, J. (*dissenting*).—This is an action brought by the plaintiff against the defendant, to recover the value of a shipment of merchandise from New York City to Clarksville, Tenn. The proof shows that the defendant company received the goods in New York, and executed therefor a bill of lading containing the marks on the package addressed to Clarksville, and embracing the following language: "Ninety-six cents per 100 lbs. To be forwarded to Clarksville, under the following conditions: It being expressly understood and agreed that, in consideration of issuing this through bill of lading guaranteeing a through rate, the Merchants' Despatch Transportation Co. reserves the right to forward said goods by any railroad line between point of shipment and destination. The Merchants' Despatch Transportation Co., or carriers over whose line the goods are transported, shall only be responsible" Then follow the several and usual (not to say invariable, at this day) clauses limiting the liability of the carrier, none of which it is necessary to notice, except the following: "It is further stipuluted and agreed that, in case of any loss, detriment, or damage done to or sustained by any of the property herein

Statement of case.

receipted for during such transportation whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening thereof." The defendant company carried the goods safely and without delay to Louisville, Ky., the terminus of its own line, in its own care, and there delivered same to the Louisville & Nashville Railroad which was the most direct route to Clarksville, to be by the last-named company carried to the point of destination. There is no proof showing how the goods were lost or destroyed. It merely appears that the particular package sued for was not delivered at Clarksville, while it is certain from the proof that the loss occurred on the Louisville & Nashville road. It does not appear how such loss was brought about—whether by fire, robbery, or otherwise, with or without negligence on the part of said Louisville & Nashville R. Co. The record shows that there was no kind of partnership arrangement between the defendant company and the Louisville & Nashville R. Co.; the latter had no share or participation in the profits of the carriage from New York to Louisville, and the former no share or participation in the freights from Louisville to Clarksville. What is said about having to pay the succeeding lines, whatever they might charge, is shown to have reference to the fact that the defendant had guaranteed the through freight, and that, so far as the shipper is concerned, the defendant would have to satisfy the freight charge of connecting lines. Verdict and judgment for the plaintiffs. Motion for new trial overruled, and appealed in error to this court. The error complained of is in the charge of the court as given, and for refusal to charge as requested.

Notwithstanding the bill of lading, the trial judge opened his charge to the jury by saying: "It is admitted that the defendant received the goods in New York from the plaintiff's agent; then, I charge you, it was its duty to deliver them to the plaintiffs at Clarksville. Nothing would excuse them except the act of God or the public enemy; and in this case it was not pretended there was such act of God or the public enemy." The statement of the law as there given, when taken in connection with the undisputed facts in the case, was well calculated to mislead the jury. Continuing, the judge said: "The defendant says it turned the cases of goods over to the Louisville & Nashville R. Co. at Louisville, as its line terminates there. But if it did so, the Louisville & Nashville R. Co., under the bill of lading or contract, was the agent of the defendant; and if the loss was the result of the negligence of that company or its servants or agents, then the defendant would be liable." This is clearly erroneous. How it can be said that the Louisville & Nashville R. Co. were the agents

Instructions—Railroads as agents for despatch company.

of the defendant company does not appear. Certainly, under the proof in the record, if there was any relation of principal and agent between the defendant company and the Louisville & Nashville R. Co., the Louisville & Nashville Co. was the principal and the defendant company was its agent authorized to make a contract binding it as to rate of freight, and to safely carry from the point of contract with defendant company to the point of destination. The railroad company was to carry on its own account, and upon its own responsibility, for its own sole compensation, the defendant company being authorized by its contract with the shipper to select the route beyond its terminus; but when selected, the railroad company became the carrier for the shipper, and not agent for the defendant company selecting it.

But before dismissing this aspect of the case, let us see further into the charge. Continuing, the judge said: "The defendant relies upon the following stipulation in the bill of lading" (here follows so much of the bill of lading relating to exemptions for loss occurring beyond its line, as we have already quoted). The judge adds: "That is in the bill of lading in fine print, and the defendant says that as the loss, if it occurred at all, occurred after it passed from its hands to the Louisville & Nashville R. Co., this clause relieves it from liability; such a stipulation might be binding on the shipper or consignee, if there was a contract to that effect signed, or mutually assented to by both parties, but here there is no contract signed by the shipper or consignee; there is nothing but a bill of lading, signed by the agent of the defendant. It is not a contract between the parties, unless you find that there is evidence establishing that the plaintiff agreed to that stipulation. Before this stipulation in the bill of lading would be binding on the plaintiff, it would be necessary for the defendant to show that plaintiff's attention had been called to it, and that they expressly or impliedly assented to it; the fact that they accepted the bill of lading from the defendant,—kept possession of it, without objection,—and introduced it in evidence, would not be sufficient, in my opinion." This is manifest error. Directly the contrary to this was held by this court in Railroad *v.* Brumley, 5 Lea, 401, following other cases in this State. Indeed, no one undertakes to defend this part of the charge, it being contended that it becomes immaterial in view of what follows in the charge. We are not prepared to admit that such manifest error could in any event be permitted to pass as immaterial. The portion of the charge which it is claimed renders the above error innocuous follows immediately upon what has just been quoted, and is this: "But whether that be so or not, in my opinion that stipulation is rendered void by the other stipulation which precedes it, to the effect that the de-

Same—Stipulation limiting liability—Instructions.

fendant reserves the right to forward said goods by any railroad line between point of shipment and destination, for by that stipulation it made the forwarding carrier its agent; and the law, on ground of public policy, could not allow it to stipulate exemptions from liability for the consequence of its agents, on their failure to do their duty." We have quoted thus at length so that the entire charge in any manner relating to the bill of lading might be seen. How the portion last quoted can be said to cure the former, we are at a loss to see, unless it be upon the idea that wrongs make a right, or the greater error swallows up the smaller; for, in my opinion, the error last quoted is greater than the former, for cases may be found in one or more of the former States to sanction the first proposition as to mutuality of contract being manifested by signature of the shipper. But we know of no case, and no principle of law, that justifies the latter proposition.

Loss beyond terminus—Stipulation for exemption.

It is too well settled now to admit of controversy that the carrier receiving freight for a point beyond its terminus may stipulate for exemption from liability for loss however occurring on another distinct line, where the carriage to point of destination renders necessary the employment of several lines, and when a reduced or a graduated through rate is the consideration for such a stipulation. Railroad *v.* Brumley, 5 Lea, 401; Dillard *v.* Railroad Co., 2 Lea, 288; Railroad Co. *v.* Campbell, 7 Heisk. 257; Railroad *v.* Holloway, 9 Baxt. 188. The last case holding the doctrine above stated adjudges also that the burden of proof is on whichever road may be sued, to show that the loss did not occur while on its road. When this shown it is a complete defence. Railroad Co. *v.* Frankenberg, 54 Ill. 88; Railroad *v.* Androscoggin Mills, 22 Wall. 594; Taylor *v.* Railroad Co., 32 Ark. 393.

Application of rule to despatch companies—Common carriers.

But it is said that while this is so as to one railroad company receiving freight to be shipped beyond its road, the rule does not apply to a despatch company or an express company. To this we answer that upon principle there can be no such distinction. The rule as announced is one applied to common carriers, for as to a private carrier, he can make his own contract, and always could, just as freely as any other private individual could make any contract not illegal. The question originally was: Could a common carrier be allowed to stipulate for an exemption from common-law liability attaching to it as such? And as we have seen, it has been answered in the affirmative. As a question of public policy, it was viewed by the court and the privilege accorded to make such stipulation. It has nothing to do with the question of negligence or fraud, but looks to hav-

ing the loss, and consequent right of recovery, fall upon the particular road having charge of the freight at the time of the loss. Now, who can say that a dispatch or express company is not a common carrier, and as such to be onerated with the same burdens and to enjoy the same privileges as common carriers? Express companies are held to be common carriers in Olwell *v.* Express Co., an unreported case, but published in 1 Cent. Law J. 186, and cited approvingly by Judge Cooper in 2 Lea, 288. They are held as common carriers in Express Co. *v.* Womack, 1 Heisk. 265. Do not the considerations of public policy which lead to the permission of restricted liability as to railroads apply with equal force to despatch and express companies? These considerations were forcibly expressed by this court in the Dillard Bros.' Case: "Courts must have regard for the great interests of commerce, upon which so much of our modern civilization depends; and, as said by the supreme court of the United States, allowing such restricted liability to be contracted for enables the carrying interest to reduce its rates of compensation, thus proportionately relieving the transportation of produce and merchandise from some of the burdens with which it is loaded." But it is said the case of Bank *v.* Express Co., 93 U. S. 177, establishes a different rule for express companies. In our opinion there is nothing in that case at war with the views we have here expressed. The case did not present the question as to right to stipulate for loss to fall upon some connecting line, but stipulated for exemption from loss by fire anywhere on the line. The learned judge, on page 181 of the opinion, says: "The stipulation there considered extends to all loss by fire, no matter how occasioned, whether occurring accidentally or caused by the culpable negligence of the carrier or its servants, and even to losses by fire caused by wilful acts of the carriers themselves." No such case here. The case is decided upon the grounds that the express company had contracted to carry all the way. The money lost by fire was in the actual custody and charge of the express messenger, the company's chosen agent. It was never delivered to the railroad, the negligent destruction of whose bridge caused the burning, but remained in the manual possession of the express company, who paid the railroad company for it, not for the shipper. It was a stipulation for exemption for its own negligence, not for exemption from the negligence of another and different carrier to whom it was authorized to deliver the goods for the common employer. On page 186, the court say, in that case: "We do not deny that a contract may be made that will put a common carrier on the same footing with a private carrier for hire, as respects his liability for loss caused by the acts or omissions of others."

Same—Rule as to express companies.

This case does not decide that the express company, who is by contract authorized to deliver freight to another express company, or to a railroad after the terminus of the express line is reached, may not stipulate for exemption from loss caused by such other express company or railroad. Well, then, if it be true that one railroad can make such contract for exemption when it has delivered to another railroad, why should not one despatch company have the same privilege?

But it is said that the fact that the first carrier reserves the right to select the succeeding carrier makes such succeeding carrier the former's agent. Where is the authority or the principle which justifies such conclusion? The first carrier had the right to select the second, without any express reservation. The fact that the bill of lading called for a point beyond his terminus, and designated no second or intermediate line, carried with it by necessary implication the right on the part of such carrier to select the succeeding carrier, he being liable only for good faith, and reasonable diligence in selecting a prudent, safe, and efficient succeeding carrier. Now, the fact that the contracting carrier saw fit to avoid any question of liability as for a deviation or otherwise in the selection of such succeeding carrier, does not make the latter his agent any more than if he had selected such carrier without such stipulation. A., as agent for B., may be empowered to select another agent for B., without such other agent becoming A.'s agent. Though designated by A., under the power of attorney, he, when selected, is as much the agent of B. as if B. had selected him in person. That an express company is accorded the privileges of a railroad company, or any other common carrier, with reference to its right to stipulate for limited liability, under like circumstances is shown by the decision of this court in Express Co. *v.* Glenn, 16 Lea, 472, where it is held that such company may stipulate for exemption from liability for loss of money or goods intrusted to it for carriage, unless the claim therefor shall be made in writing 30 days from the date of the contract. Every consideration which is urged in the opinion of the majority of the court as to the impolicy of allowing the transportation company to avail itself of the limited liability claimed in the contract at bar, applies with equal force to the inexpediency of allowing the exemption in the 16 Lea case. None of the cases cited in the opinion of the majority, in my judgment, warrant the distinction sought to be made. The result reached is this: A railroad company, when it is the first and contracting company, will be allowed for the consideration of reduced or guaranteed through freight to limit its liability to its own line, where it has contracted for a point beyond. A de-

Second carrier as agent of first.

Policy of giving despatch company privileges of express company.

spatch, transportation, or fast-freight company, though held to be in all respects as much of a common carrier, will not, under identically the same circumstances, be allowed the same privileges where it reserves the right that it and the railroad both had without such reservation, to select one of several competing lines that meet it at the terminus of its own line. To such a conclusion I cannot assent. The very same considerations of public policy,—the reduction of freights, and the expedition of delivery—which lead the courts to permit the limited liability in the one case would suggest the like privilege in the other. It has nothing to do with the impolicy of allowing carriers to contract for the exemption from liability for the negligence of itself or agents or employees. Such exemption is not to be accorded to either the railroad or transportation company, and is not contended for nor involved in the case at bar; but the question is, is there any difference between the right to make such a contract by a fast freight line, and the same right in a railroad company? The only difference between the two is that the railroad company owns the track and the cars, while the freight company carries the cars only. Both are held to be common carriers; both make identically the same form of contract with the shipper; both have to turn over goods to connecting lines when the terminus of their own is reached. I must plead guilty to a total inability to discover the rule or the reason for any different measure of responsibility to be applied in the one case and not in the other.

Express and despatch companies as carriers—Efforts to limit liability.

I can readily see where some confusion may appear to exist growing out of the language used *arguendo* in some of the reported cases, where express companies have sought to claim exemption from the liability of common carriers by assuming to be forwarders merely. When such companies made this effort, the courts were prompt and emphatic in holding that neither express companies nor dispatch companies would be allowed to claim to be free from the same burdens that the law places upon other common carriers. But when they were held to be common carriers, and onerated with its burdens, they were given all its privileges under like circumstances. I say under like circumstances, for, of course, when an express company sends its messenger along, who retains possession and control of the package, it will not be heard to say that it is not a common carrier to the end of the journey simply because it uses the tracks or the cars of other companies. All the cases referred to in the majority opinion recognize the dispatch companies as common carriers in the fullest sense of the term, and make no such distinction as is established here. They recognize the right of such companies to make the same contracts, and apply

the same rules and principles in determining their liability, no more and no less than is applied to ordinary railroad companies. Robinson *v.* Transportation Co., 45 Iowa, 470; Stewart *v.* Transportation Co., 47 Iowa, 229; Bancroft *v.* Transportation Co., Id. 262; Transportation Co. *v.* Bolles, 80 Ill. 473; Transportation Co. *v.* Leysor, 89 Ill. 43. In this case the goods were to be transported from New York to Alton, Illinois, and it was conceded that this company could make the same stipulation that other common carriers make as to fire exemption, provided the contract was expressly agreed to by the shipper; applying to it the same rule that is in force in that State with reference to railroad companies. The authority cited for the distinction that is sought to be made here, is based entirely upon express cases where the messenger accompanied the goods. That such was the case of Bank *v.* Express Co., 93 U. S. 174, has already been shown. To the same effect exactly is the case of Buckland *v.* Express Co., 97 Mass. 124, so extensively quoted in the opinion of the majority. There was a contract by the express company to carry from Springfield, Massachusetts, to Vicksburg, Mississippi. The loss was occasioned by explosion on the Mississippi river steamboat. The effort was to claim the restricted liability of a forwarder only, and, failing in this, to rely on a contract for limited liability as carrier made with a person assuming to be an agent of the consignee. The points decided were: First. That where an express company assumes entire possession and control of the goods to the point of destination, the liability is that of a common carrier to the end of the route, although it may style itself a forwarder only. Second. That the facts of the case do not show that the consignee assented to any restriction on the liability of the express company as a common carrier. Bigelow, C. J., in delivering the opinion in that case, expressly recognizes the right of such a carrier to stipulate for limited liability in proper cases. He says: "If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such limits that it may be done under his personal care and supervision, or by agents, where he can select and control; but if he undertakes to extend it further, he must either restrict his liability by a special contract, or bear the responsibility which the law affixes to the species of contract into which he voluntarily enters." Again he says: "It is not a case where the agreement between the parties was that the merchandise was to be delivered over by the defendant to the other carrier at an intermediate point, thence to be transported over an independent route to the point of destination," etc. Yet this and Bank of Kentucky Case are made the bases for the conclusion reached by the majority of my brothers supplemented by the case of Christenson *v.* Express Co., 15 Minn. 270 (Gil. 208),

which is identical with the other two and in which the court emphasizes the fact that "a messenger in the employ of the defendants accompanied the goods as they are being transported to take general charge of the same, and to deliver to its proper local agents." If this decision rests not on the facts that the express companies assume and contract themselves to carry over the whole route, as shown by the use of their own messengers, who have and assert always a personal custody of the goods, then the learned judges who have rendered the opinions have been singularly infelicitous in the use of language, as shown by the quotations which we have made.

The opinion of the majority assumes that the distinction between the right of a railroad company and of an express company (or despatch company) to make such contract as is adjudged invalid here, is to be found in the fact—quoting from the opinion—"that express companies and despatch companies alike use the conveyance of others in the performance of their respective contracts;" and therefore it is that "the other carrier becomes the agent of the express company." This manifestly cannot be the basis of the distinction, for the self-evident reason that a railroad company issuing a through bill of lading to a point beyond its own terminus "uses the conveyances of others in the performance of its contract." If this fact is to make the other carrier the agent of the first in the one case, it would produce the same result in the other. Surely a distinction that is not based upon a difference can hardly commend itself as a good distinction. We assert again that a reading of the cases will show that the pivotal point of the decisions referred to is the personal custody of the goods by the express messengers.

Policy of granting privilege of exemption to despatch companies.

Believing that it is of great public concern that a contract for limited liability beyond the line of the first carrier where there is a through freight guaranteed should be permitted where shippers see fit voluntarily to make such contract; and being unable to see any reason why the same privilege should not be accorded the fast freight lines, which were born of the necessities of commerce and rapid transit, I am constrained to dissent from the opinion of my brethren. Such companies are used to a very large extent in the commerce of the country, and are esteemed of such great value to the merchants engaged in such lines of business as require cheap, quick, and safe delivery of goods, that I regard the result of the conclusion reached by the majority as calculated to hamper the enterprise and business of the merchants of this State, placing them at disadvantage with the merchants of other States. To attempt to protect is not unfrequently to cripple. The class who contract with these fast freight companies are generally able to protect themselves;

and if they need protection from any supposed improvidence in arranging for transportation, they certainly need it more with reference to the railroads of the country than with these fast freight lines; and the same rule should be applied to the railroads. But so long as railroads are allowed to make such contracts, I will insist that these freight lines should enjoy the same privilege; that they are entitled to be put upon the same footing with railroads with reference to these contracts as common carriers. See Insurance Co. *v.* Railroad Co., 104 U. S. 146, where the Erie & Pacific Despatch contracted for shipment of goods from St. Louis, Missouri, to London, England; its bill of lading containing the same stipulation, in so many words, as is in the bill of lading in case at bar, as to loss being placed only on the company in whose actual custody the goods were at the time of loss. The question decided was, the first railroad company was not liable for loss by fire in warehouse of a subsequent connecting line. But it was not placcd on the bill of lading, as the court found other grounds upon which to rest its decision, and there is nothing adjudged in this case that is in point with the case at bar. But I refer to it merely to show that the Erie & Pacific Despatch Co. was treated throughout as entitled to all the privileges of a special contract as are given railroad companies, including the right to select the intervening carriers, the court, on pages 154 and 155, saying: "If the bill of lading constituted the contract of transportation, and the defendant is to be regarded as one of the connections of the despatch company, then manifestly the law would be for the defendant, for the bill of lading expressly limits responsibility for loss to that carrier in whose actual custody the cotton might be when lost or destroyed." Analogous cases might be multiplied, but it seems needless to pursue the subject further.

In my opinion, the judgment in this case should be reversed, and cause remanded for a new trial.

Common Carrier—Contracts Limiting Liability.—As to contracts by common carriers limiting their liability for loss or injury to freight received for shipment, see, *post*, Western & A. R. Co. *v.* Exposition Cotton Mills, 602; International & G. N. R. Co. *v.* Moody, 607; Louisville & N. R. Co. *v.* Sherrod, 607, note; Union Pac. R. Co. *v.* Mayer; St. Louis, Iron Mountain & Southern R. Co. *v.* Weakly.

Same—Lex Loci Contracts.—See, *post*, International & G. N. R. Co. *v.* Moody, 607.

ALLEN

v.

CAPE FEAR AND YADKIN VALLEY R. CO.

(*North Carolina Supreme Court, April* 9, 1888.)

Common Carriers—Discrimination—Action for—Pleading.—An action against a railroad company for discriminating unjustly against a plaintiff by directing its agents to refuse to receive or transport any goods offered for transportation by the plaintiff, except when prepaid, does not state a cause of action if it fails to aver that the agents of the company actually have refused to receive or transport his goods, and that he has actually been injured.

Same—Slander and Libel—What Constitutes Libel—Published Order to Servants.—Written direction by a railroad company to its agents, instructing them not to receive or ship for a designated person any articles or merchandise of any description, except when the freight charges therefor are prepaid, and a request to a connecting line receiving freight therefrom to make a similar order, is a privileged communication, and does not constitute libel, in the absence of express malice.

APPEAL from Superior Court, Cumberland County.

Action by plaintiff, J. L. Allen, against defendant, the Cape Fear & Yadkin Valley R. Co., for unjust discrimination and libel in publishing an order not to carry plaintiff's freight except when the freight charges are paid. Plaintiff appeals from judgment of dismissal on the pleadings.

W. A. Guthrie, N. W. Ray, and *T. H. Sutton* for appellant.

D. Rose and *G. M. Rose* for appellee.

SMITH, C.J.—The plaintiff sued out a summons against the defendant company on May 14, 1884, and, upon the return of service, set out his cause of action in the following complaint filed: "(1) The above-named plaintiff, complaining, says that the above-named defendant, the Cape Fear & Yadkin Valley R. Co., is, and was at the time hereinafter mentioned and referred to, a corporation duly created and existing under and by virtue of the laws of North Carolina, and, as such, was acting as a common carrier in the transportation of passengers and freight to and from the town of Fayetteville, in said county of Cumberland, and exercising and enjoying all the rights, powers, and privileges appertaining to railway corporations as common carriers and warehousemen. (2) That the defendant, James S. Morrison, was, at the time hereinafter mentioned and referred to, in the employment of said corporation defendant as engineer and superintendent of said

Facts—Pleading.

railway. (3) That the plaintiff, J. L. Allen, at the time hereinafter mentioned and referred to, was engaged in business in said town of Fayetteville as a merchant and dealer in furniture and other merchandise, and also as a manufacturer of furniture, and sash, blinds, doors, and other building material. (4) That, as such merchant, dealer, and manufacturer, the plaintiff was a patron of said railway, and was accustomed to use the same in the transportation of goods and materials to his said place of business and manufactory, and also in the shipping of furniture, goods, sash, blinds, etc., from his store and factory in said town of Fayetteville, using the said road as merchants, dealers, and shippers of all kinds were and are accustomed to do. (5) That on or about the 6th of May, 1884, the defendant James S. Morrison caused to be issued from his office an order as follows, viz.: "MAY 6, 1884. *To Agents:* From this date you are instructed to ship no lumber or merchandise of any description to Mr. J. L. Allen, of Fayetteville, N. Car., except when all freight and charges are paid. J. S. MORRISON, Engineer and Superintendent,"—and caused the same to be sent to all the agents on the line of said railway, and also requested Maj. Winder, who is the superintendent of the Raleigh & Augusta Air Line R., to give the same instructions to agents on his road. The said Raleigh & Augusta Air Line R. was at that time the only railroad that connected with the Cape Fear & Yadkin Valley R., and delivered freight to, or received freight from, the Cape Fear & Yadkin Valley R. (6) That said Cape Fear & Yadkin Valley R. Co. was accustomed to receive and transport goods, merchandise, and freight of all kinds, for all shippers, without requiring prepayment of freight and charges, and up to said May 6, 1884, the plaintiff had been treated as all other customers in that respect; but the aforesaid order was a discrimination against the plaintiff specially, and was not made to apply to the other customers or patrons of said corporation generally. (7) That the said corporation defendant, upon its attention being called specially to said order by the plaintiff, refused to change or modify it, and said corporation has enforced said order against the plaintiff. (8) That the issuing and enforcement of said order by said J. S. Morrison and by the Cape Fear & Yadkin Valley R. Co., as plaintiff is advised and believes, was wrongful and unlawful. (9) That by reason of the aforesaid order, wrongfully and unlawfully issued by said J. S. Morrison, and wrongfully and unlawfully carried out and enforced and published against the plaintiff by said J. S. Morrison, chief engineer and superintendent, and by said Cape Fear & Yadkin Valley R. Co., the plaintiff has been greatly damaged and injured in his aforesaid business, and in his financial standing and credit as a merchant, dealer, and manufacturer, viz., in the sum of ten

thousand dollars. Whereupon the plaintiff demands judgment against said Cape Fear & Yadkin Valley R. Co., and said James S. Morrison for the sum of ten thousand dollars, and for the costs of this action.

"BROADFOOT, RAY AND GUTHRIE, Attorneys for Plaintiff.

"J. L. Allen, the above-named plaintiff, being sworn, says that the foregoing complaint is true, except as to matters therein stated as upon information and belief, and as to these matters he believes it to be true.

"J. L. ALLEN.

"Sworn and subscribed before me, August 14, 1884.

"T. S. LUTTERLOH, C. S. C."

The defendants put in their answer, in which they admit the material facts set out in the complaint, and among them the issue of the order to the agents of the company to require payment of all the goods consigned to the plaintiff; and this they justify on the ground of his repeated refusals and delay in paying freight bills when presented, and the inconvenience and embarrassment resulting therefrom, and his disregard of the notice given of the intended action of the company. On defendant's motion to dismiss the action, the following judgment was rendered: "This cause coming on to be heard upon the complaint and answer, and after argument, it is now, on motion of defendant's counsel, as upon a demurrer *ore tenus*, that the complaint does not state facts sufficient to constitute a cause of action, ordered and adjudged that this action be dismissed, and that the defendant recover judgment against plaintiff for costs, to be taxed by the clerk. Walter Clark, judge presiding." From this ruling and the judgment consequent on it the plaintiff appeals.

Discrimination—Necessary averments in complaint.

In examining the complaint, it will be seen that it does not show that the company, or any of its agents, ever in fact refused to receive or transport any goods offered for transportation to the plaintiff, or that any inconvenience, expense, or delay has been incurred by reason of the issue of the order, or that it has been acted on and enforced to the plaintiff's detriment or damage. The gravamen of the complaint is that the order itself is personal, and discriminates between him and other persons who may wish to use the road for transportation purposes, in requiring of him an advance payment, when goods are sent, which is not required in the case of others; and the allegation is that this is not allowable, because the company is a public corporation and a common carrier. Still the fact remains, or at least the contrary is not averred, that the order is still without practical results of which the plaintiff can complain, and until it is put in force it is

no more than a declaration of the intention, and not a cause of action.

In the argument before us it is insisted, and such seems to have been the object in view in framing the complaint, that the order is a libellous publication, hurtful to the plaintiff's credit as a business man who has frequent occasion to use the road, and implies, at least, a charge of impaired credit, if not an approaching insolvency. If this be a reasonable inference from the terms of the order, it should have been charged in direct terms that such was its meaning, so that upon the face of the complaint it could be determined whether a cause of action is set out, or it would be exposed to a demurrer. But assuming this obstacle to be out of the way, the alleged libellous matter consists merely in a direction given by the company to its subordinates for the regulation of their conduct, and a request given to the superintendent of a connecting road which interchanges freight with the defendant company, and seems to be clearly, unless malicious (and malice is not imputed), a privileged communication, proper in itself, and essential to the harmonious working of the road. In Wakefield *v.* Smithwick, 4 Jones (N. Car.), 327, Pearson, J., thus lays down the law upon this subject: "The defence under the doctrine of privileged communication is much broader, and much more favorable to the defendant [referring to a plea of justification]; for, if he succeeds in proving such a relation between himself and the person to whom the communication is made as authorizes him to make it, the burden is upon the plaintiff to prove that it was not made *bona fide*, in consequence of such relation, but out of malice, and that the existence of such relation was used as a mere cover for his malignant designs. When, however, the plaintiff shows that the matter communicated was false, the question of *bona fides* becomes an open one, and the defendant is called on for some explanation to meet the inference arising from the fact that he has communicated false information." The plaintiff, a trader, employed an auctioneer to sell off his goods, and otherwise conducted himself in such a way that his creditors reasonably concluded that he had committed an act of bankruptcy. One of them sent the auctioneer a notice not to pay over the proceeds of sale to the plaintiff, saying, "he having committed an act of bankruptcy." This was held to be a privileged communication as being made in the honest defence of defendant's own interest. Odger, Sland. & Lib. 226, citing Blackham *v.* Pugh, 2 C. B. 611, 15 Law J. C. P. 290. Again it may be asked wherein consists the alleged libellous matter? The order, assuming it to have been issued in the interest of the company, real or supposed, to withdraw from the plaintiff a privilege which hitherto

Libellous publication—Privileged communication.

It also tried to avail itself of the benefits and exceptions of the contract made with the first carrier, and this was also disallowed by the court. We think that, under this declaration, the defendant was entitled to relieve itself of liability by making this proof.

Limiting liability—Lex loci contractus—Risk assumed.

3. This contract in the bill of lading, limiting the liability of the carrier, would not have been a good contract in Georgia; but it seems that under the laws of Massachusetts it is a good contract in that State. It not being intended by the parties to take effect wholly in Georgia, but to be partly performed in several different States, including Massachusetts, it can be enforced here. It would be unjust to hold, under this declaration, that the defendant company could not avail itself of the benefit of this contract, and that it must pay the damages here, and settle with its connecting lines, when those connecting lines, under the laws of their States, could rely upon the contract and defeat a recovery when sued by the Georgia company. Of course none of the carriers could exempt themselves from liability arising from their own negligence. Although the goods were shipped at the owner's risk, and the carriers were not to be liable for damages caused by the weather or rust, still, if the damage was caused by the weather or rust occasioned by the negligence of the carrier or by unreasonable delay upon the road, the carrier guilty of the negligence would be liable. The owner could well say: "While I agreed to take the risk, I did not agree to take the risk of your negligence. I agreed to take the risk of the weather in open cars, if delivered within a reasonable time; but I did not agree to take the risk of the weather for over thirty days, when you should have delivered in ten."

Damage by reason of open cars.

We also think that, if the shipper of this machinery agreed that it might be loaded and transferred upon open cars, the railroads should not be held liable for any damage caused by its being so loaded, or any damage which occurred during its transportation by reason of its being in open cars. The carrier should be held liable only for its own negligence, or for the damage caused by its unreasonable detention on the road. If ordinary diligence required the carrier to cover these cars during a detention on the road, and in failed to do so, it would be liable for any damage occurring while thus detained if the damage arose from the want of such covering. These being the rules of law controlling this case, under the pleadings, and the trial judge having failed to apply them, it follows that his judgment must be reversed.

Common Carrier—Contracts Limiting Liability.—As to, see, *ante*, Block *v.* Merchants' Despatch & Transportation Co., 579, and note, 601.

Same—Connecting Lines.—See, *post*, Palmer *v.* Chicago, Burlington & Quincy R. Co.; St. Louis, Iron Mountain & Southern R. Co. *v.* Weakly.

INTERNATIONAL AND GREAT NORTHERN R. CO.

v.

MOODY.

(*Texas Supreme Court, October* 30, 1888.)

Common Carrier—Lease of Road—Negligence of Lessee.—In the absence of authority conferred by statute, one railroad company cannot lease its road to another so as to absolve itself from its obligations to the public, and its liability for damages occurring through the negligent or wrongful use or operation of its property.

Same—Loss of Freight—Liability.—Liability for loss of freight burned at a depot cannot be avoided by the railroad company under a plea that its road was leased to another company who also owned the depot.

Same—Connecting Lines—Stipulation Limiting Liability—Lex Loci Contractus.—A railroad company sued for damage to freight received from another company, and shipped in another state, must, in order to obtain the benefit of an exemption from liability for loss occasioned in the manner set out, and which is provided for in the bill of lading issued by the other company, and in the other state, must allege and prove that such stipulation exempting from liability is lawful in the state where it was made.

APPEAL from a judgment in favor of defendant, in an action for damages for the loss of fruit-trees consigned to plaintiff and burned while at defendant's depot.

H. E. Barnard for appellant.

Shook & Dittmar, and *T. T. Vander Hoeven* for appellee.

HOBBY, J.—The plaintiff in the court below recovered a judgment against the International & Great Northern R. Co. for the destruction by fire of a car-load of fruit-trees and shrubbery, at the depot of said company, in Austin, Tex., to which point it was transported by defendant, and consigned to plaintiff, in November, 1884. It is urged by the appellant, under the fourth and fifth assignments of error, that "the evidence showed that the International & Great Northern Railroad was leased to the Missouri Pacific R. Co. in June, 1881, and which latter company operated and controlled, as lessee, the International & Great Northern Railroad, and hauled the car of trees over the road-bed owned by the International & Great Northern R. Co.; that the burned depot was the property of the latter; and that there was no evidence showing that the International & Great Northern R. Co. had anything to do with the damage." If the evi-

Absolution from liability by lease.

ously been paid by the defendants to the plaintiffs, were unreasonable, so as to subject the defendants to undue prejudice or disadvantage, within the meaning of § 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and the defendants claimed a set-off, and also counter-claimed, in respect of the alleged over-payments on previous occasions.

The material facts sufficiently appear from the judgment.

Littler, Q.C., Bigham, Q.C., and *J. B. Edge* for plaintiffs.

R. Henn Collins, Q.C., and *C. A. Russell* for defendants.

CAVE, J.—This is an action to recover the sum of 247*l.* 16*s.* 7*d.*, for the carriage of the defendants' goods by the plaintiffs, and was tried before me on the northern circuit.

At the hearing two points were raised. The first was whether there was such an agreement by the defendants to pay the rates claimed by the plaintiffs as to deprive them of the right to say that they have been charged too much. Now with reference to that point I have read the letters which were relied upon by Mr. Littler, and I find nothing in them to justify me in coming to the conclusion that the defendants have deprived themselves of the right of objecting to the rates as being too high. They amount to nothing more than an inquiry as to what the plaintiffs' rates were. The defendants did not bind themselves to send any goods. It was merely a question, "What are your rates for carrying goods to such and such places?" Answer, "At the present moment they are so and so. How long they are going to be so we do not undertake to say." That was all, and that clearly to my mind does not by itself deprive the defendants, if they can make out their case, of the right to say that the charges were excessive by reason of their being unequal, or on any other ground arising out of the plaintiffs' acts in carrying for other people upon other terms.

Agreement by defendants to pay rates.

The second question was this. The defendants allege that the charges made against them were unreasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), § 2, and they seek to reduce the charges upon that ground. They also seek to set off previous payments made by them for the carriage of other goods, which they contend were over-payments because the charges were unreasonable within the same section; and inasmuch as they claim a return larger than is sufficient to cover the whole of the plaintiffs' claim, they have also made a counter-claim, in which they claim these excess payments so far as they exceed the sum necessary to cover the plaintiffs' claim in the action. The contention on the part of the plaintiffs is that this defence cannot be set up, and, on the same grounds, that neither

Unreasonable charges—Set-off and counter-claim.

the set-off nor the counter-claim can be maintained. If the defence cannot be set up, it is obvious that the set-off and counter-claim cannot be maintained. In order to settle that question it is necessary to look at one or two clauses of the Railway and Canal Traffic Act of 1854. The 2d section provides that every railway company shall afford reasonable facilities for receiving and delivering traffic, and so on, and that no company "shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Now before that act was passed, in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), § 90, there was a provision requiring that the company should charge equal rates, but that had been construed by the courts to mean equal rates for the carriage of goods over the same portions of the line, so that, if there was a charge from A. to B., which was equal to all persons sending goods from A. to B., no objection could be raised to that under § 90 of the Railways Clauses Consolidation Act, but if a particular person, X., was charged so much for the carriage of his goods from A. to B., and another person, Y., was charged less, then there was an inequality within the meaning of § 90 of the Railways Causes Consolidation Act, which entitled the person aggrieved to maintain an action for the amount which had been overcharged to him. Where, however, the places over which the goods were carried were not the same, as for instance where there was a charge of so much from A. to B., and of so much from B to C., then, although the charges might be the same, while the distances were only half in the one case what they were in the other, yet that was not an inequality within § 90 of the Railways Clauses Consolidation Act.

Grievance under Railway Clauses Consolidation Act.

In order to meet this grievance the Railway and Canal Traffic Act, 1854, was passed, and by § 2 of that Act it is open to any person to complain that he is subjected to undue or unreasonable prejudice or disadvantage by reason of the charge for carriage from A. to B. being excessive as compared with what is charged for carriage from B. to C. That complaint was one which before then he could not have made, but under the Railway and Canal Traffic Act, 1854, he is enabled to go before the court to make that complaint. Obviously the considerations would be of a somewhat intricate nature. It would be necessary to inquire what were the reasons why more was charged for one distance than was charged for another distance, or why proportionately

Remedies of Railway and Canal Traffic Act—Proceedings thereunder.

Evidence—Receipt of trees.

It is also complained that the court erred in admitting, over appellant's objection, the statement of the witness Patterson, as follows: "I told Mr. Moody at the time that I would not have the whole lot. I saw one party receive his trees, but I think he was scared into taking them." The only effect this evidence could have had, was to show that the trees received by plaintiff were damaged or worthless. This fact was testified to positively by several witnesses, and among them was appellant's witness Evans. It did not affect the verdict. Appellee's and Newson's testimony fixed the value of the trees at $8,519.06. Appellee testified that he received trees amounting in value to $900; that not one fourth of the latter were good trees, or of any value. This would have placed his actual damages at about $8000, and at which sum he estimated it. The verdict of the jury was for $5000. We are of opinion that there was no error in the record requiring a reversal of the cause, and that the judgment should be affirmed.

STAYTON, C.J.—Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

Common Carrier—Limiting Liability.—As to contracts by common carriers limiting liability, see, *ante*, Block *v.* Merchants' Despatch & Transportation Co., 579, and note, 601.

Same—Warehousemen—Storage—Negligence in Shipping—Liability.—Where property is delivered to a warehouseman to ship by a connecting carrier to its place of destination, and the condition of his yard is such that, as a man of ordinary prudence he should have foreseen the danger to which the property would be exposed by reason of its liability to fire, he will be guilty of negligence if he does not ship it by the first opportunity afforded, and will be liable for its loss. Merchants' Wharf-Boat Ass'n *v.* Wood, 64 Miss. 661.

Same—Loss—Proximate Cause.—In an action against a warehouseman to recover for the destruction of goods in his yard by fire, an instruction that tells the jury that if the condition of the yard, the proximity of laborers' cabins, the habit of smoking in the yard, and the fact that railroad engines ran in the yard, warned the defendant of the danger of fire, then if a fire occurred, though not originating from either of these sources, and though neither of them contributed to the loss, he will be responsible therefor, is erroneous. Merchants' Wharf-Boat Co. *v.* Wood, 64 Miss. 661.

No Power to Lease Without Legislative Authority.—See International, etc., R. Co. *v.* Muderwood, 34 Am. & Eng. R. R. Cas. 570; note, 32 Am. & Eng. R. R. Cas. 510, and cases cited.

LOUISVILLE AND NASHVILLE R. CO.

v.

SHERROD.

(Alabama Supreme Court, March 22, 1888.)

Common Carrier—Reduction of Rate—Limiting Liability—Validity.—It is proper for a railroad company to stipulate in a bill of lading, by an agreement fairly understood by the shipper, and without undue advantage, for a limitation, to a specified sum, of its liability, in case of the total loss of the goods shipped, in consideration of a reduction from the regular and reasonable rate of freight, to a much lower one.

APPEAL from a judgment in favor of defendant, in an action to recover the value of household goods, belonging to plaintiff, destroyed while in transportation over defendant's railroad.

Jones & Falkner for appellant.

Williamson & Holtzclaw for appellee.

CLOPTON, J.—The suit is brought by appellee to recover damages for the failure of appellant to deliver furniture and other goods shipped from Birmingham to Cherokee, Ala. The goods were destroyed by a collision between two of defendant's trains on a bridge, which was "unsafe for the passage of trains in case of collision thereon, and was being repaired." The bill of lading contains a stipulation limiting the value of the goods, and the extent of the defendant's liability in case of total loss. The agreed statement of facts shows that without such agreement as to the value a much greater rate of freight was charged on such shipments than was charged in this case, which rate was reasonable; and that the limitations as to value was in consideration of a reduced rate of freight, and was inserted in the bill of lading as a part of the contract of shipment. The plaintiff contends that a carrier cannot stipulate so as to limit the common law measure of his liability for loss caused by his own negligence. The contestation is founded on the general proposition that a common carrier cannot relieve himself by special contract from liability for loss or injury resulting from his negligent conduct. Facts.

Whether a carrier may limit the extent of his liability by an agreed valuation has heretofore been considered in several cases by this court. In Railroad Co. *v.* Henlein, 52 Ala. 606, where the action was on a contract for the transportation of live stock,

such stipulation was, under the circumstances of the case, sustained as just and reasonable. It was said: "If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal, and the amount of freight received, we should not hesitate to declare it unjust and unreasonable; but, as the case is presented, it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier from exaggerated or fanciful valuations. We cannot, therefore, pronounce it unjust and unreasonable, and it is the measure of the appellant's liability." The principle of the decision is that the carrier and shipper may lawfully contract as to valuation in case of loss, when the contract is supported by an adequate consideration, and there is no imposition, coercion, or unfair dealing. This ruling was adhered to in a subsequent case between the same parties. 56 Ala. 368. In Railroad Co. *v.* Little, 71 Ala. 611; s. c., 12 Am. & Eng. R. R. Cas. 37, expressions are found in the opinion to the effect that the law will not tolerate that a carrier shall stipulate, by special contract, for exemption from liability for the value of the goods carried, when the loss or injury occurs from the want of ordinary care, skill, and diligence. The main question in the case related to the construction and effect of a special term in the bill of lading limiting the extent of the company's liability. The contract was constructed as not exempting the company from liability for the value of the goods if lost by the want of ordinary care, skill, and diligence. The rule established by the preceding cases was recognized; which is that the limitation of the carrier's common-law liability may extend "to the amount of damages for which he will be liable in the event of loss or injury, when the purpose appears to secure a just and reasonable proportion between the amount for which he is liable and the freight which he is to receive." The first of the cases above referred to is cited as sustaining this rule. It was not intended to overrule the former cases. The decision is in terms confined to the case before the court, which was a non-delivery, without excuse or explanation; and the effect of the decision is that, in such case, the special term of the contract does not exempt the carrier from liability for the value of the goods. And in the subsequent case of Railroad Co. *v.* Oden, 80 Ala. 38, a stipulation limiting the liability to the value of the cotton at the time and place of shipment was sustained as just and reasonable, where the cotton was destroyed by fire, though the loss may have been the result of negligence. Limitations as to value do not come under the operation of the rule that a carrier cannot, by special contract, exempt himself from liability for the consequences of

Limitation by agreed valuation.

his own negligences, and, ordinarily, are not calculated to induce negligence. To the amount of the agreed valuation, the carrier is responsible for loss occasioned by his neglect or by any of the risks or accidents for which he is answerable. No public good will be subserved by denying to the parties the right to make such contracts. The shipper and the carrier may lawfully contract as to the valuation of the articles to be transported. Such special contract is in the nature of an agreement to liquidate the damages proportionately to the compensation received for the carriage, and the responsibility of safely carrying and delivering. In many cases, the carrier does not know, and has not the means to ascertain, the real value of articles offered for shipment. An agreement as to the valuation may be a reasonable and proper mode of adjusting the measure of liability to the amount of freight paid by the shipper, who thereby receives the benefit of a reduced rate. When the value has been thus fairly agreed on, the carrier cannot recover a greater rate, and the shipper should not be allowed to take benefit of the reduced rate if there is no loss, and to repudiate the contract if there is a loss.

Same not within rule that carrier cannot limit his liability for negligence.

This question has undergone much consideration and discussion by the courts of this country, and the decisions are not in accord; but the tendency of the late decisions is to sustain such contracts, when made in good faith, and both parties have freedom of contracting. In a case similar to this in many of its features, Morton, C. J., says: "We cannot see that any sound public policy requires that such contracts should be held invalid, or that a person who, in such contract, fixes a value upon the goods which he intrusts to the carrier, should not be bound to his valuation." And Blatchford, J., in a late case, holding such limitations just and reasonable, says: "The distinct ground of our decision in the case at bar is, that when a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Graves *v.* Railroad Co., 137 Mass. 33; Hart *v.* Railroad Co., 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604. Many other authorities might be cited, but it is unnecessary. There is, however, a qualification of the rule. A common carrier exercises a public employment, and is bound to receive and carry, at reasonable rates, any goods offered, and the

Such contracts generally held valid.

Exception to rule—Coercion of shipper.

means of transportation are greatly monopolized. Under these circumstances, a carrier will not be permitted to take advantage of his position to coerce the shipper to agree to a limited value by a threatened charge of a high and unreasonable rate, if such agreement is not made. There must be no imposition, coercion, or undue advantage. Neither can the carrier stipulate for immunity from liability for fraud, or for intentional or reckless negligence. Such special contracts may be avoided by wilful or wanton negligence, in disregard of the rights of the shipper. The agreed statement of facts shows that in this case the higher rate which the defendant charged, in the absence of an agreed valuation, was reasonable, and that the agreed valuation was in consideration of a reduced rate. The shipper had the option to pay the high rate, and hold the carrier responsible for the full value of the goods, or obtain a reduced rate, based on the agreed valuation. Having freedom to contract, he chose the latter, and received the benefit; and will not be permitted, under such circumstances, in the absence of imposition or unfair advantage, to repudiate the value to which he agreed. "It would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of a loss." Hart *v.* Railroad Co., *supra*.

Reversed and remanded.

Common Carriers—Shipment of Live Stock—Reduced Rates—Stipulations as to Liability.—In Central R. & Banking Co. *v.* Smith *et al.*, 4 So. Rep. 828, it was held by the supreme court of Alabama that where defendant agreed, in consideration of being released from all liability except for fraud and gross negligence, to transport horses at a reduced rate, the shipper to have free passage on the train with the horses, and to care for them through the route, it is not liable for injury to the horses caused by want of proper care on the route, though it allowed the shipper to ride on its passenger train. See Railroad Co. *v.* Henlein, 52 Ala. 606; Railroad Co. *v.* Henlein, 56 Ala. 368; Farnham *v.* Railroad Co., 55 Pa. St. 53; Railroad Co. *v.* Dunbar, 20 Ill. 624; Railroad Co. *v.* Whittle, 27 Ga. 535; Railroad Co. *v.* Thomas, 83 Ala. 343; Squire *v.* Railroad Co., 98 Mass. 239.

The court say: "Railroads, as now operated, are relatively a new invention, and transportation upon them of cattle or live-stock is a still newer commercial appliance. In the very nature of things, more than ordinary risks attend such shipments. The reasons for this increase of hazard or risk will naturally suggest themselves. So great is the liability of live-stock transported in cars to be injured in the transit, that in some courts it is held that the common-law liability of carriers does not attach to such service. Cooley, the distinguished constitutional lawyer, says (Torts, 641): 'The common-law liability of a common carrier does not apply in all respects to railroad companies as carriers of live-stock.' He is more or less supported in this view by the following adjudged cases, most or all of them from courts which rank among the highest. Smith *v.* Railroad Co., 94 Mass. (12 Allen), 531; Squire *v.* Railroad Co., 98 Mass. 239; Penn *v.* Railroad

Co., 49 N.Y. 204; Clarke *v.* Railroad Co., 14 N.Y. 570; Farnham *v.* Railroad Co., 55 Pa. St. 53; Railroad Co. *v.* McDonough, 21 Mich. 165; Railroad Co. *v.* Dunbar, 20 Ill. 624; Railroad Co. *v.* Whittle, 27 Ga. 535; Railway Co. *v.* Nichols, 9 Kan. 235. While we do not consider it necessary to announce any opinion on the general correctness of the proposition stated above, we think we may safely adopt the opinion of the New York court of appeals, that 'while common carriers are insurers of inanimate property against all loss and damages except such as are inevitable, or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care.' Penn *v.* Railroad Co., 49 N.Y. 204; Clarke *v.* Railroad Co., 14 N. Y. 570; Railroad *v.* McDonough, 21 Mich. 165: Railroad Co. *v.* Johnston, 75 Ala. 596; s. c., 22 Am. & Eng. R. R. Cas. 437. It is settled in this State, and is generally, if not universally, conceded, that, within certain limits, common carriers may by contract limit the extent of their liability. The limits are that such contracts, to be legal, must be fair and reasonable, and that carriers cannot contract for immunity against the consequences of their own negligence. Steele *v.* Townsend, 37 Ala. 247."

As to Contracts of Carriers Limiting Liability.—See, *ante*, Block *v.* Merchants' Despatch Transportation Co., 597, and note, 601.

Stipulation in Bill of Lading for Limitation to Specified Sum.—See Rosenfield *v.* Peoria D. & E. R. Co., 21 Am. & Eng. R. R. Cas. 87, note, 91, and cases cited therein.

UNION PACIFIC R. CO.

v.

MOYER.

(*Kansas Supreme Court, November* 10, 1888.)

Carriers of Goods—Negligence of Owner—Failure to Deliver Goods—Destruction by Fire.—Where goods are shipped over a railroad, and are permitted by the owner to remain at the depot of their destination until the railroad company becomes liable therefor only as warehousemen, and afterwards such goods are demanded by the owner, and he is informed by the agent in charge of such depot that the goods have not yet arrived, and afterwards said depot, together with the goods, is burned up, *held*, that the failure to deliver the goods on demand of the owner is such negligence as will render the company liable for the value of the goods.

Same — Liability of Warehousemen — Limiting Liability — Evidence. — Where, on the shipment of goods, a receipt is given to the shipper therefor, on the back of which is printed a contract limiting the liability of the carrier in the transportation of the goods, and the liability as common carrier on the safe arrival of the goods at their destination, and afterwards said goods are permitted to remain at their destination until such carrier becomes liable only as warehousemen, and afterwards said goods are destroyed by fire, *held*, in an action by the owner to recover their value, the

and determine the matter speedily, in such manner as to do justice in the premises, and on such hearing the report of said commission shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to such court on such hearing that the lawful order or requirement of said commission, exercised in pursuance of the provisions of this act, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be enforced by proper process issued out of said court." Section 17 of said act provides to the effect that whenever the commissioners deem that repairs are necessary upon any railroad, or an addition to or change of its stations or station-houses, or change in its rates of fares for transporting freight or passengers, or in the mode of operating its road and conducting its business, they shall in writing inform the corporations of the improvements or changes which they consider proper, and a report of the proceedings of compliance or of a refusal to comply with such suggestions shall be included in their biennial report to the legislative assembly. Section 18 of the act requires the board to investigate the cause of any accident on any railroad resulting in loss of life, and invests it with discretionary power to investigate any accident on such road. Section 19 requires every railroad company or corporation on request to furnish said board any information required by it concerning the condition, management, and operation of the road or business of such company or corporation. Section 20 of said act provides that the board may prescribe the form of the annual statement required to be transmitted to the secretary of State by every company or corporation owning or operating a railroad in this State provided for by act of the legislative assembly of the State of Oregon approved February 26, 1885, and empowers the board to make changes and additions to such form, and requires it to examine such statements when filed, and if the same be defective or appear erroneous to notify the corporation to correct it. Section 22 of said act provides that in case any railroad company or corporation refuses to submit its books, etc., to the examination of the board, or to furnish information provided for in that act, or fails, neglects, or refuses to do or perform any of the requirements of the act, it shall forfeit and pay to the State of Oregon for every such offence a sum of not less than $100 nor more than $500, to be recovered in an action in the name of the State of Oregon against such company or corporation. And section 23 of the act empowers the board to enter the cars,

depots, stations, and other places of business of such corporations, for the purpose of inspecting the same, and to observe the manner and methods in which the business of such corporation is done. These sections of the act contain, so far as I am able to discover, all the provisions bearing upon the question submitted; and it must be ascertained from them whether the proceeding can be maintained or not. The main object of the act was to ascertain the condition of railroad affairs in the State, and the manner in which they are being conducted. Sections 9, 10, and 11 thereof clearly indicate that such was its purpose. Said sections endow the board of commissioners created by the act with ample power to investigate the subject. This was obviously done in order to enable the legislature to judge as to whether the railroad management was such as was calculated to conserve the best interests of the public; whether the public were being dealt fairly with by those in charge of such management, and whether changes could not be made which would be beneficial to the community. The State has an interest in such matters, and it is highly proper that the legislature should inquire into them; and should it ascertain that the railroad companies were pursuing a selfish, mercenary course, and disregarding the rights of their patrons, it could provide suitable regulations to remedy the mischief. Whether a railroad company is employing suitable means and appliances for the transportation of freight and passengers over the line of its road with reasonable safety and dispatch, and as cheaply as it can afford to do and obtain a fair profit, in view of the amount of its investment, is always a pertinent subject of inquiry for the legislature; and the object of the act, it seems to me from the general spirit and tenor of it, in creating the board of commissioners and clothing it with the functions it possesses, was for the purpose of making such inquiry. I cannot conclude that the legislature undertook to correct the abuses of railroad companies before it could know with any certainty whether they had been committed. It would not be likely to appoint a commission for execution to precede one of inquiry; nor that it would delegate its discretion in so important a matter to an inferior board to be exercised. The railroad enterprises in this State are as yet in their infancy. The people are greatly interested in having them extended into every district where marketable articles are produced, and it would be very unwise, as well as unjust, to pursue a rash and narrow policy toward them. It is not contended on the part of the respondent that said act invested the board of commissioners with authority to fix the rate to be charged for the transportation of freight or passengers; nor, as I view it, were they empowered

Same—Powers of board to investigate subject.

Froustine, 31 Ib. 19, note, 101; Gashweiller *v.* Wabash, etc., R. Co., and note, 25 Ib. 403.

Carrier Erroneously Informing Consignee of Non-arrival of Goods.—See Worden *v.* Canadian Pac. R. Co., 30 Am. & Eng. R. R. Cas. 127; Burlington, etc., R. Co. *v.* Arms, 16 Ib. 272.

CHICAGO, BURLINGTON AND QUINCY R. CO.

v.

MANNING *et al.*

(*Nebraska Supreme Court, March* 8, 1888.)

Corporations—Service of Summons—Foreign Corporations.—Under section 912 of the Civil Code a summons against a corporation may be served upon its chief officer if he be found in the county. If not so found, then upon its cashier, treasurer, secretary, clerk, or managing agent; or if none of these can be found, by copy left at the office or usual place of business of such corporation, with the person having charge thereof. This, as well as section 914, applies to foreign corporations, except where there are special provisions to the contrary.

Judgment—Enjoining—Allegation of Defence.—Where it is sought to enjoin a judgment, upon the ground that the plaintiff has a defence to the action, and it would be inequitable and unjust to enforce the judgment, the facts constituting the alleged defence must be pleaded, and it is not sufficient to merely allege that plaintiff had such a defence.

Carriers of Goods—Loss—Act of God.—Upon the facts proved, *held*, that the loss was not occasioned by the act of God, and that the plaintiff was liable for the loss.

APPEAL from a judgment for defendant, in an action brought by the Chicago, Burlington & Quincy R. Co., appellant, against Joseph P. Manning and others, appellees, to enjoin a judgment rendered by default against the appellant in a suit in which Parrish & Barker were plaintiffs, and the railroad company defendant.

Howard B. Smith for appellant.

C. H. Brown, *C. A. Baldwin*, and *J. J. O'Connor* for appellees.

MAXWELL, J.—This action was brought by the plaintiff against the defendants to enjoin a certain judgment. Plaintiff alleges, in its petition, "that it is a corporation, duly organized and doing business under the laws of the State of Illinois. That the defendant Joseph P. Manning is a constable, duly qualified in and for the county of Douglas and State of Nebraska, and that the defendants

Facts—Pleading.

Francis M. Barker and Henry M. Parrish were, at the times hereinafter mentioned, partners, doing business as Parrish & Barker. That on or about the 10th day of December, 1881, the said Henry M. Parrish and Francis M. Barker, partners as aforesaid, commenced an action before Luther Wright, Esq., a justice of the peace in and for said county and State, to recover the sum of $122.50, and interest, alleged to be due said defendants from said plaintiff for failure to deliver safely certain goods described in the bill of particulars filed therein. That on said day said justice issued a summons thereon, which said summons was returned not served. That thereupon, upon the 21st day of December, 1881, said justice issued an *alias* summons, and delivered the same to said constable, J. P. Manning. That said summons commanded the said plaintiff herein, the Chicago, Burlington & Quincy R. Co., the defendant therein, to appear before said justice of the peace at his office in the city of Omaha on the 31st day of January, A.D. 1881, at 9 o'clock in the forenoon. That on the 24th day of December, 1881, the said summons was returned by said constable, J. P. Manning, indorsed as follows, to-wit: "DECEMBER 21, 1881. Received this writ December 23, 1881. Served by delivering a certified copy of this writ and indorsements thereon to W. J. Davenport, general managing agent of the Chicago, Burlington & Quincy R., the defendant, in Douglas county, Nebraska, no other officer being found." That thereupon, upon the 31st day of December, 1881, the said summons was by the said justice quashed and a third summons issued, returnable January 9, 1882, at 9 o'clock A.M., which said summons was delivered to said constable, J. P. Manning, and was returned indorsed as follows, to-wit: "DECEMBER 31, 1881. Received this writ January 3, 1882. Served by delivering a certified copy of this writ and indorsements thereon at the office or usual place of business of said corporation (with Harry Duel, the person having charge thereof), the defendant, no officer being found in Douglas county, Nebraska. J. P. MANNING. Fees, 85c." That said summons was further indorsed as follows, to-wit: "Filed 31st day of December, 1881. LUTHER A. WRIGHT, Justice of the Peace." That thereupon, upon said 9th day of January, 1882, the said justice of the peace rendered judgment by default against the said Chicago, Burlington & Quincy R. Co. for $125.50 damages, and $2.70 costs of suit. That afterwards, to-wit, on the 23d day of January, 1882, the said justice issued an execution upon said judgment and delivered the same to the defendant, J. P. Manning, constable, wherein and whereby the said constable was commanded to collect said judgment, with costs indorsed, and increase costs out of the personal property of the said plaintiff herein, and to pay the same to the defendants,

Parrish and Barker. That afterwards, to-wit, upon the 31st day of January, 1882, the said Chicago, Burlington & Quincy R. Co., by its attorney, appeared at the office of the said justice, between the hours of 9 and 10 A.M., as commanded in the *alias* summons aforesaid, and learned for the first time that judgment had been rendered against it as aforesaid. And plaintiff further says that it is a foreign corporation, and is not a corporation within and under the laws of the State of Nebraska; that its railroad terminates at Council Bluffs, Iowa; that the office mentioned in the return of service, indorsed by said constable on the summons issued December 31, 1881, was not at that time, has not been, and is not now, the office of the said plaintiff for any purpose except that said Harry Duel has at the same for sale, and sells, tickets for transportation over the plaintiff's lines as well as the lines of other railroads; that W. J. Davenport is the general agent of the plaintiff; that he resides in the city of Council Bluffs, Iowa; that his office is there; the records, books, correspondence, etc., pertaining to his duties as such officer are kept there, and there only; that said Davenport comes to the city of Omaha, remains a few hours, and returns to the said city of Council Bluffs; that said W. J. Davenport was present openly in Omaha, Nebraska, fulfilling the duties of his office as usual, several times from the 31st day of December, 1881, up to and including the 5th day of January, 1882, and could have been served with the third summons in said action; that the only property said plaintiff has in Nebraska consists of cars upon the tracks of other railroads and tickets on sale at said Duel's office, which cars are in constant service for the transportation of freight, and which tickets are of no value except when stamped by the proper agent; that plaintiff had no further or other notice of the pendency of said action than as aforesaid set out; that said plaintiff, and its officers and agents, had no actual knowledge of the said summons issued December 31, 1881, and returnable January 9, 1882, or of the service or the return thereof; that it has a good and complete defence to the matter and things alleged in the bill of particulars filed in said action before said justice, and that said judgment is inequitable and unjust; that said constable threatens to and is about to levy upon the property of this plaintiff; and unless he be restrained and enjoined by the honorable court, will levy upon the same and take the same into his possession, and advertise the same for sale and sell the same, and great and irreparable injury will thereby be done this plaintiff, in that its property will be sacrificed, its business as a common carrier interrupted, and it will be involved in a multiplicity of suits. Wherefore plaintiff prays that said judgment may be declared void, and that an order of injunction may issue restraining and

enjoining the said Joseph P. Manning, constable, from proceeding any further under said execution, and the said defendants, Henry M. Parrish and Francis M. Barker, partners as Parrish & Barker, or either of them, from selling, assigning, or transferring said judgment, and from enforcing, or attempting to enforce, said judgment in any manner or degree whatever." The defendants filed an answer, to which the plaintiff replied, but it is unnecessary to notice either the answer or the reply. On the trial of the cause the court found in favor of the defendants, and dismissed the action. The plaintiff appeals.

The testimony tends to show that in the years 1881 and 1882 one W. J. Davenport, who resided in Council Bluffs, was the general managing agent of the plaintiff at the Bluffs and also at Omaha; that one Harry Duel was the ticket agent at Omaha for the plaintiff, the Chicago & Northwestern and the Chicago & Rock Island Railways, selling tickets for each of said railways. He claims that he was employed by them jointly, but that is not material in this case, as he evidently was the agent of each of said lines. The pool was dissolved in 1884, and Duel continued in the service of the plaintiff. The testimony also shows that Davenport was in Omaha a few hours each day, and that he kept his office in Omaha in Duel's office; that the ordinary practice where suits were brought against the plaintiff in Omaha was to serve the notice on Duel. It also appears that many of these actions have been brought against the plaintiff, Duel stating that Manning alone had served about 100 such notices upon him. No objections seem to have been made in any of those cases to the authority of Duel. Section 912 of the Code provides: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof." These are general provisions applicable to all corporations having an office or usual place of business in this State, whether a foreign corporation or one organized under the laws of this State. It is true that section 914 provides that when a foreign corporation has a managing agent in this State, the service may be on such agent. This section was construed by the court in Porter *v.* Railroad, 1 Neb. 15, and it was held that service in this State upon a managing agent of a foreign corporation was sufficient, although such agent was not a resident of this State. These sections originally were 9 and 11 of an act, "Of the jurisdiction and procedure before justices of the peace," etc., approved Jan-

Service of summons on foreign corporation.

uary 13, 1860, no change having been made in said sections since they were passed. Section 912 applies to any corporation doing business in this State, and having an office therein, except where there are special provisions to the contrary. It is the policy of our law to afford redress through our courts to any person aggrieved, whether a natural person or a corporation, and to apply the remedy, as far as possible, at the place where the injury was sustained. If a foreign corporation has an office in this State for the transaction of business, seeking thereby to promote its own interest, such office will also be its place of business where a summons may be served upon it; and a party aggrieved will not be required to go into another jurisdiction to enforce his rights against it. It must take the burden with the benefit. The service, therefore, was sufficient to have required the plaintiff to appear and answer.

2. The position wholly fails to state a cause for equitable relief. It is said that the plaintiff has a defence to the action, but no facts are stated showing in what the alleged defence consists. This is necessary in order that the facts may be put in issue, and a mere statement of a conclusion is not sufficient to authorize the granting of an injunction. Had a demurrer been filed to the petition, it should have been sustained; but even if the allegations of the petition were as full as the proof, it would not justify the granting of an injunction. The testimony shows that Parrish & Barker shipped certain trees from Rochester, N. Y., to Omaha. When the trees reached Creston, Iowa, the plaintiff's railway from Pacific Junction to Council Bluffs was impassable by reason of high water, and that, therefore, the trees were not shipped over that line. It is claimed that the high water, being an act of God, exonerates the plaintiff. There is no proof, however, that such floods were not to be anticipated, or that the railway had been so constructed as to withstand the same. Neither is there any proof that the company was unable to transmit the trees in question promptly over another line. The proof, therefore, does not show that the failure to deliver the trees promptly was caused by the act of God. The proof is undisputed that when the trees reached Council Bluffs they were dried up and dead, and that they were of the value of $122.50. The equities of the case are with the defendants, and the judgment is clearly right, and is affirmed.

Injunction against judgment—Allegation of defence.

Act of God.

The other judges concur.

Service of Process on Foreign Corporations.—See Maxwell *v.* Atchison, etc., R. Co., 34 Am. & Eng. R. R. Cas. 574; Central R. & B. Co. *v.* Carr, 23 Ib. 487; Chaffee *v.* Rutland R. Co., 10 Ib. 408; State *v.* Pennsylvania R. Co., 1 Ib. 626; Stout *v.* Sioux City, etc., R. Co., 2 Ib. 645; Mohr *v.* Insurance Cos., 6 Ib. 620.

CHARLESTON AND SAVANNAH R. CO.

v.

MOORE.

(*Georgia Supreme Court, April 4, 1888.*)

Common Carriers—Jewelry—False Statement of Shipper—Liability for Loss.—A railroad company is exempt from liability for loss, through its negligence, of jewelry and wearing apparel, the character of which is misrepresented by the shipper, and which are shipped over its line as household goods, in order to obtain a lower rate of freight.

ERROR to review a judgment in favor of plaintiff for $200 entered on a verdict, in an action against a railroad company for loss of goods by negligence. The opinion states the case.

Chisholm & Erwin and *Wm. Deleaken* for plaintiff in error.

J. G. & D. H. Clark for defendant in error.

BLANDFORD, J.—The defendant in error brought her action against the Charleston & Savannah R. Co. to recover damages which she alleged she sustained by reason of the negligence of the railway company in not carrying and safely delivering to her certain goods which had been shipped from a point on its road to the city of Savannah. The jury rendered a verdict in her favor for $200; whereupon the company moved for a new trial, which was refused, and it excepted. The grounds of the motion are that the verdict is contrary to law and to the evidence, and is excessive. The evidence shows that two boxes and one bundle of bedding were delivered to the railway company, and consigned to Mrs Moore, the defendant in error, as household goods; and it is uncontradicted that the statement made to the agent of the company at the time they were delivered to him and receipted for was that they were household goods; whereas, it appears from the testimony a considerable portion of the articles delivered consisted of jewelry or ornaments, and wearing apparel. The verdict of the jury was for the full value of the articles sued for. It further appeared, and was not contradicted, that there was a different rate of charges for goods in nature of jewelry or wearing apparel from that charged for household goods, the rate of freight for the latter being lower than for the former. Facts.

1, 2. We think that this verdict was excessive. The shipper

should have stated truly to the agent of the company the nature and character of the goods shipped. A misrepresentation by the shipper in this respect is held by some of the decisions of this court to amount to a fraud upon the railway company receiving the same as a carrier, which relieves the company of its liability. It was contended by counsel for the railway company that this misrepresentation relieved the company entirely from liability for the goods received; but we do not agree to that. We think the company is only exempt from liability as to the goods in regard to which the representation was made. Household goods, goods such as the railway company agreed to carry, it was bound to carry and safely deliver to the consignee. The principle upon which the carrier is relieved from liability, under some of the decisions of this court, as already stated, is that there was a fraud upon the carrier. But there is another good reason: The carrier did not undertake to carry anything but household goods; wearing apparel was not included in the contract, and hence the carrier was only bound to carry such goods as the shipper represented to be contained in the boxes and bundles, and which it contracted to carry.

Misrepresentation—Carrier not relieved entirely.

3. We think that all of the verdict over $100 was excessive; and we direct that the court below shall require all over that amount to be written off, and the judgment be allowed to stand to the amount of $100; the plaintiff in error, however, being entitled to its costs in this court.

Judgment reversed on terms.

Common Carrier—Loss of Goods—Statements made by Shipper as to Value made at Time of Shipping—Evidence.—In an action against a railroad company for the loss of goods shipped by it, defendant's agent testified that, at the time of the shipment, plaintiff's husband, with whom the agreement for shipment was made, stated that, if the goods were lost, the company would have to pay him $25. The court charged, in substance, that unless it appeared that both the husband and the agent had authority to make such valuation, and actually agreed upon it, it would not be binding upon plaintiff. *Held*, that the jury, in ascertaining the value of the goods, might properly consider such testimony, and that the charge withdrew it from their consideration, and was erroneous. Savannah, F. & W. R. Co. *v.* Collins, 77 Ga. 376.

Same—Shipping Jewelry as Wearing Apparel.—As to liability of carrier for loss of jewelry shipped as wearing apparel, see note to Blumenthal *v.* Main Central R. Co. (Me.), 34 Am. & Eng. R. R. Cas. 254.

SLATER

v.

SOUTH CAROLINA R. CO.

(*South Carolina Supreme Court, July* 2, 1888.)

Common Carrier—Loss of Goods—Act of God.—A railroad company is not liable for damages occasioned by injury to freight in transportation, which is caused solely and entirely by an earthquake, and without fault or negligence on the part of the company.

APPEAL from a judgment of nonsuit, in an action to recover damages for injuries to certain horses and mules shipped by plaintiff upon defendant's road.

Thomas M. Raysor and *Lathrop & Wannamaker* for appellant.

Brawley & Bornwell and *Izlar & Glaze* for respondent.

SIMPSON, C. J.—In the case below, the plaintiff sought to recover damages from the defendant, a railway corporation, for alleged injuries to certain horses and mules shipped by plaintiff at Augusta, Ga., and consigned to plaintiff at Orangeburg, in this State. The main defence set up was that the injury complained of resulted from the direct act of God, to-wit, the recent earthquake, "on the night of 31st of August, 1886, which was unforeseen, unprecedented, and providential, setting loose the waters confined in the pond at Langley mill, adjacent to the track of said defendant, near Horse creek, a locality on the road; and said waters being irresistible in their violence swept away and destroyed the said horses and mules which were not delivered, and injured the rest in some degree, the defendant having exercised due care and diligence, both in the transportation of said horses and in an effort to save them." At the close of plaintiff's testimony, from which it appeared, through the cross-examination by defendant's attorney, that in all probability the injury resulted from the earthquake, the presiding judge, on motion of defendant, granted a nonsuit, on the ground that he was satisfied that the earthquake—an act of God—caused the injury, and that there was no sufficient evidence of negligence on the part of the defendant to carry the case to the jury. The appeal questions this ruling of his honor. A common carrier, at common law, is an insurer against all injuries to the property in transit, except such as may be caused by an act of God, or of the public enemies or by some excepted cause in a

Case stated.

Carrier's liability.

special contract, other than negligence, and the defendant not having contributed thereto by his negligence; and the *onus* is upon the defendant to show the cause claimed as a defence. The recent case in our own court of Wallingford *v.* Railroad Co., 2 S. E. Rep. 19, is sufficient authority here. The law in reference to nonsuits has been stated in several recent cases. In brief terms it is as follows: A nonsuit should be granted where there is a total absence of testimony to all or to any one of the material averments in plaintiff's complaint. Not simply where, in the opinion of the judge, the testimony as to its force and weight is insufficient to make out the plaintiff's case in every particular, but where there is no relevant or pertinent evidence to one or more of the said averments; no evidence that the jury could consider and weigh, if the case went to them. This is the general rule, but in addition to this, where the defence, if true, would be sufficient to defeat the plaintiff, and that defence is admitted or not controverted by the plaintiff, then the case is in substance one of a total failure of evidence, and a nonsuit would be proper. Pool *v.* Railroad Co., 23 S. C. 289. Now, in the case before the court, the material allegations of the complaint were, first, that the defendant was a common carrier; that the horses and mules in question were shipped upon defendant's road; and that they were injured before they reached their destination. There was certainly evidence as to all of these allegations, which, *prima facie*, should have carried the case to the jury. But the ground of the nonsuit is that an act of God (the earthquake) was the cause of the disaster; that this fact appeared from the testimony of plaintiff's witnesses on cross-examination; true, not admitted in terms, but yet not controverted; and consequently that fact stands in the case as substantially admitted, thus bringing the case under the rule of Pool *v.* Railroad Co., *supra*. Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there were any negligence on the part of the carrier, such that if it had not been present the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility. And the *onus* is upon the carrier to show not only that the act of God was the cause, but that it was the entire cause; because it is only when the act of God is the entire cause that the carrier can be shielded. He insures against everything except the act of God and the public enemies; and unless he proves that the disaster was due wholly and entirely to one of these causes, then it must be presumed to be due, in part, at least, to some other cause. And as against any other cause he is an insurer. The *onus*, then, is upon him to prove the absence

Rule as to nonsuit.

Injury caused by act of God —Onus on carrier.

of negligence, unless, as we have said, the proof is that the act of God is the entire cause, which, if so, would of course in itself show the absence of negligence. Now, the matter for the presiding judge to consider in this case when the motion for nonsuit was made—inasmuch as the earthquake seemed to be the cause of the injury—was whether it was the entire cause. If not, the question of negligence as contributing to said injury was still open, and, being a matter of fact, should have gone to the jury. But if it appeared that the earthquake was the entire cause, admittedly so, or at least not seriously controverted, then this negatived the idea of negligence, contributory or otherwise; and there was no necessity for the case to be sent to the jury. Looking at the case when the plaintiff closed, and before the defendant was called upon to introduce witnesses to its defence, the case as made out by plaintiff's witnesses, sustaining, as they did, the defendant's defence, was not in our opinion such a case as demanded further investigation by a jury, because under the peculiar circumstance there was an absence of testimony to material allegations of the complaint, as in the case of Pool *v.* Railroad Co., *supra* It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER and McGOWAN, JJ., concur.

Carrier not Liable for Loss of Goods Caused by Act of God.—Texas Ex. Co. *v.* Scott, 16 Am. & Eng. R. R. Cas. 111; South & N. Ala. R. Co. *v.* Wood, 9 Ib. 419; Davis *v.* Wabash, etc., R. Co., 26 Ib. 315, note, 322; Rogers *v.* Cent. Pac. R. Co., 22 Ib. 305, *n.*

GLENN *et al.*

v.

SOUTHERN EXPRESS CO.

(*Tennessee Supreme Court, May* 5, 1888.)

Common Carrier—Loss of Goods—Notice of Claim.—A condition in an express company's receipt for a package of money delivered to it for transportation, that, in order to recover for any loss, a written claim therefor must be presented within thirty days after receipt of the package, is a reasonable requirement, but its letter is not always imperative; and where the claimant shows a legal excuse for a failure to comply therewith,—as, for instance, ignorance of a shortage in the package until after the expiration of the prescribed time,—and that the claim was presented as soon

after the discovery of the loss as was reasonably possible, the condition will not necessarily preclude a recovery.

ERROR to review a judgment for defendant in an action to recover the amount of a shortage in the money package received by defendant for delivery to plaintiffs.

Poston & Poston for plaintiffs in error.

Gillham & Miller for defendant in error.

Stipulation reasonable—Excuse for failure to comply.

TURNEY, C.J.—In the receipt of the company for the money package is the clause: "In no event is this company to be liable for a greater sum than the above mentioned; nor shall it be liable for any such loss unless the claim therefor shall be made in writing at this office within thirty days from this date," etc. The shipment was to have been made from Rutherford, Tenn., to the plaintiffs, in Cincinnati, and could have been made and heard from in a very short time. Therefore the stipulation is a reasonable one; and, with nothing explaining a non-compliance with its requirements, should be enforced. If, however, a sufficient legal excuse be shown for the failure of a strict compliance,—if, for example, the plaintiffs had shown that, without fault or blame on their part, they did not discover that the amount sued for and claimed to have been extracted from the package had been inclosed therein and delivered to the company, and there was no material fact connected with the delivery to them of the remainder of remittance calculated to give them notice or put them on inquiry, and that, within a reasonable time after the discovery of the shortage, the notice provided for was given,—this would, in legal contemplation, be a compliance with the stipulation. The court charged the jury: "Plaintiffs should have at once, and within thirty days from date of shipment, have noticed the express company of the shortage; and, if plaintiffs failed to do so, this was such negligence, should you find by the receipt and contract of shipment in this instance it is provided that the express company should not be liable for loss of the money intrusted to it for transportation to the plaintiffs, unless the claim therefor should be made in writing at the office of shipment within thirty days from date of such receipt. . . . The court charges you that was a reason-condition, and you will find for the defendants." This is error. The plaintiff's had introduced evidence tending to excuse them for their delay in making claim of the company for the shortage; also that claim was made as soon after discovery as was reasonably possible, and that the delay of discovery was not chargeable to their neglect or fault. The charge of the court means that the stipulation is imperative, and limited to its letter. This construction, of course, withdrew from the jury the proof

alluded to heretofore, and upon which the plaintiffs had the right to have the jury pass under a proper charge.

Reversed and remanded.

Stipulations Limiting Time within which Claims for Damages must be Presented to Carriers.—See Pacific Express Co. *v.* Darnell, 32 Am. & Eng. R. R. Cas. 543, note, 546.

PALMER *et ux.*

v.

CHICAGO, BURLINGTON AND QUINCY R. CO.

(*Connecticut Supreme Court of Errors.*)

Common Carriers—Connecting Lines—Advanced Freight.—Where a railroad company requires a shipper of freight, consigned beyond its terminus to advance the amount of freight for the entire distance, it must so deliver the goods to its connecting carrier that the latter would be under the same obligation in reference to them which would have been upon it if the goods had been received by it from the consignor with advance payment of the freight.

Same—Agreement Between Lines—Liability for Loss.—Where two connecting railroads are under a mutual agreement that no freight shall be considered as delivered for transportation from one to the other unless the freight is prepaid, or guaranteed by indorsement on the way-bill, one of them cannot relieve itself from liability for injury to freight by placing the car in which it was stowed on a track used in common by both railroads, and notifying the through railroad thereof without payment, or guarantee of payment of the freight.

APPEAL from a judgment in favor of plaintiff against defendant the Chicago, Burlington & Quincy R. Co., in an action against said company and the Pennsylvania Co., for breach of a contract to carry goods. The opinion states the case.

George A. Hickox and *John T. Hubbard* for plaintiffs.

Groves and *Judd* for Chicago, Burlington & Quincy R. Co.

S. H. Fenn, S. A. Herman, and *A. T. Roreback* for Pennsylvania R. Co.

PARDEE, J.—This is a complaint for breach of a contract to transport goods as common carriers, asking for judgment against one or the other of the two defendant corporations, the Chicago, Burlington & Quincy R. Co. and the Pennsylvania Co. The court rendered judgment against the former, and in favor of the latter; and the former, with the plaintiffs, appealed to this court. The following finding of facts

Facts.

was made by the court below: The Chicago, Burlington & Quincy R. Co.'s road extends from Council Bluffs, Iowa, to Chicago, Ill., Chicago being its eastern terminus, at which place its road connects with the railroad of the other defendant. The Pennsylvania Co.'s road extends from Chicago to Pittsburgh, Pa., that being its eastern terminus. On the 20th day of May, 1885, the plaintiffs, at Council Bluffs, delivered to the Chicago, Burlington & Quincy R. Co. the goods mentioned in the complaint to be transported to Litchfield, Conn., and received from the company the following bill of lading:

"COUNCIL BLUFFS, May 20, 1885.

"Received from P. T. Mayne, in apparent good order, by the Chicago, Burlington & Quincy R. Co., to be transported to ——, the following articles, as marked and described below, subject to the general rules of the said company, and the conditions and regulations of their published freight tariff applying on shipment of freight from this station to the destination named; it being expressly agreed and understood that the said Chicago, Burlington & Quincy R. Co., in receiving the said packages to be forwarded as aforesaid, assumes no other responsibility for their safety than may be incurred on their own road.

Marks and consignee.	Description of articles as given by consignor.
Mrs. H. E. Palmer, Litchfield, Ct. (Schedule of Articles) Guaranteed.	H. H. Goods. Wt. 4200 pounds. O. R. & Rel. Chas. Keith. D."

The Chicago, Burlington & Quincy R. Co. transported the goods, upon its own road, safely and without damage, to Chicago, arriving there the 23d day of May, 1885, and on that day, being Saturday, placed the car containing the goods upon a piece of railroad track occupied in common by both the defendants, and called a "Y." At about half past 10 in the forenoon, the car containing the goods was taken by the Pennsylvania Co. and switched onto its track, and taken to its freight depot, where the goods were unloaded by the workmen of the Pennsylvania Co., and placed in its freight depot, May 25, 1885. At the time the goods were so taken by the Pennsylvania Co., the bill of lading accompanying the same was also delivered to that company, but by mistake on the part of some of the officers of the Chicago, Burlington & Quincy R. Co. the bill of lading was not marked, "Freight charges guaranteed," as it should have been. The goods remained in the depot of the Pennsylvania Co. till the 26th of May, 1885, when the proper officers of that company notified the Chicago, Burlington & Quincy R. Co. that

they declined to forward the goods, because the freight charges were not guaranteed, and returned the expense bill to the Chicago, Burlington & Quincy R. Co., refusing to receive the goods for transportation till the freight charges were paid, or until a notation of "Freight charges guaranteed" was entered thereon; and in the afternoon of June 1, 1885, the expense bill was received from the Chicago, Burlington & Quincy R. Co. by the Pennsylvania Co., with these words added, "Freight charges guaranteed;" but the expense bill was not so received till after the fire hereinafter described, and after the injury complained of was done to the goods. On the 1st day of June, 1885, a fire broke out in the depot of the Pennsylvania Co., and a part of the goods were destroyed, and a part injured and damaged by the fire and by water used to put out the fire; the amount of the damage being $698. I find that the Chicago, Burlington & Quincy R. Co. is liable therefor, and judgment is rendered accordingly against that company, and for the plaintiffs to recover of it that sum and their costs, and for the other defendant, the Pennsylvania Co., to recover of the plaintiffs its costs. In coming to this conclusion, I find that by virtue of the contract guaranteeing freight charges from Council Bluffs, the Chicago, Burlington & Quincy R. Co. undertook and agreed to transport the goods from the place of shipment to Litchfield, Conn., and that the delaying the same at Chicago was owing to its not having furnished the Pennsylvania Co. its freight charges, or notifying that company that freight charges were guaranteed, as it was in duty bound to do. I further find that it was the custom between those companies that each should receive as common carriers, and transport towards their destination, all goods left on the piece of common track called a "Y," by the other company, on being prepaid the freight thereon, or on receipt of an expense bill with the words, "Freight charges guaranteed," or words equivalent thereto, indorsed by the delivering company thereon; but it was their custom not to receive or forward such goods unless freight was prepaid, or freight charges guaranteed. The Chicago, Burlington & Quincy R. Co. claimed upon the facts and the contract of shipment that it only contracted to carry the goods from Council Bluffs to Chicago, and that it had fully performed its contract by placing the same in the possession of the Pennsylvania Co. in good condition. It also claimed that under the contract of shipment it could not be held liable for the loss and damage to the plaintiffs' goods, as such loss and damage did not happen on its road, as by the conditions and terms of the contract. It also claimed that it did not make a contract to transport the goods to Litchfield, Conn., and that it could not legally make a contract to carry the same beyond its eastern terminus. It also claimed that the Pennsylvania Co.

was liable for the damage to the plaintiffs, as the loss happened when the goods were in its possession, and that the Pennsylvania Co. was negligent in not giving notice to it that the bill of lading was not satisfactory until the 26th day of May, 1885, having had the goods and bill of shipment in its possession more than three days prior thereto. But the court overruled all these claims. The plaintiffs claimed that both defendants had been guilty of negligence, and were liable in this action; that the bill of lading, by the law of Iowa, where the goods were shipped, made it the duty of the Chicago, Burlington & Quincy R. Co. to transport the goods to Litchfield, their place of destination: that, whether or not such construction should be given to the bill of lading by the court, it was the duty of the company, after transporting the goods to Chicago, to so place the same in the possession of the Pennsylvania Co. as that it would thereby be rendered responsible as a common carrier for the care of the property, and would be obliged to forward it without unreasonable delay towards its destination; that whether the Chicago, Burlington & Quincy R. Co. had made such delivery of the goods to the Pennsylvania Co. was a question of law and fact for the court to decide, and, if it had made such delivery, then, on such construction of the bill of lading, it would not be liable, but in that case the Pennsylvania Co. would be liable to the plaintiffs. The court having rendered judgment against the Chicago, Burlington & Quincy R. Co., that company appealed, assigning the following reasons: (1) That this defendant fulfilled and performed its contract by the safe delivery of the goods in Chicago, the eastern terminus of its road; (2) that under the finding of facts this defendant was not in law liable for the damage that happened to goods three days after their delivery to the Pennsylvania Co. at Chicago, and while in the depot of that company; (3) that by the finding it appears that this defendant delivered the goods to the Pennsylvania Co. on the 23d day of May, 1885, and that company took possession of the same, and placed them in their depot for shipment, and did not give notice to this defendant of any reason why the goods had not been forwarded to their destination till the 26th day of May, 1885, and that this negligence on the the part of that company absolved this defendant from any duty arising under its contract, express or implied, for the care and responsibility of the goods; (4) that, under the facts as found, the Pennsylvania Co., and not this defendant, was liable for the damage to the goods; (5) that the court erred in deciding that under the contract of shipment this defendant agreed to transport the goods from Council Bluffs, Iowa, to Litchfield, Conn.; (6) that this defendant never made any such contract to transport the goods to Litchfield, Conn., and could not in law make any

Grounds of Appeal.

such contract. The plaintiffs appealed, assigning the following reasons; (1) Because on the pleadings and on the facts found the plaintiffs were entitled to judgment against both defendants, and the court erred in rendering judgment in favor of the Pennsylvania Co.; (2) because the finding of facts shows that the Pennsylvania Co. was guilty of such negligence as entitled the plaintiffs to judgment against it, and the court erred in rendering judgment in its favor.

We are not required to determine the question whether or not the Chicago, Burlington & Quincy Railroad Co. came under an obligation to the plaintiffs to transport and be responsible for the goods over the entire distance. It received them into its custody for transportation, marked to a place beyond its terminus. It required of the plaintiffs, as a prerequisite, satisfactory security for the payment of the freight to that place; practically required advance payment for the freight to be carried by itself,—an advance deposit of money with it for that to be earned by the several carriers over the entire distance. As a matter of law, therefore, it agreed with the plaintiffs, not only to discharge its duty as a common carrier in reference to the goods over its own railroad, but also to so deliver them at Chicago into the possession of the common carrier there connecting with it, the Pennsylvania Co., as that the latter would be under the same obligation as common carrier in reference to them which would have been upon it if the goods had been received by it from the consignor with advance payment of the freight. Hewitt *v.* Railroad Co., 63 Iowa, 611; s. c., 18 Am. & Eng. R. R. Cas. 568; Bancroft *v.* Dispatch Co., 47 Iowa, 262; Railroad Co. *v.* Manufacturing Co., 16 Wall. 318, 324. A valuable consideration for this agreement is found in the benefit derived from being allowed to carry the goods over its own line. And the power to make such agreements is so necessary to the profitable as well as beneficial use of its franchise that it is to be considered as having been granted in its charter; as being a necessary incident thereto. Each company had agreed that it would not consider any goods as having been delivered to the other for transportation unless there had been either payment, or this indorsement on the way-bill of "Freight charges guaranteed." Before the delivery of this, the Chicago, Burlington & Quincy R. Co. did not relieve itself from the assumed obligation as carrier, nor did the Pennsylvania Co. come under any. It is of no legal significance that the former placed the car containing the goods upon a piece of track used in common by both; none that it notified the latter that the goods were in that car on that track; none that it was in the power of the latter to have taken the goods from that place. There was wanting the certi-

Obligation assumed by the C., B. & Q. R. Co.

C., B. & Q. road not relieved until delivery of indorsed way-bill.

R. Co., 107 U. S. 102. But the last carrier in the connecting lines was bound to deliver the animals at the place of destination, and to the consignee there, or to his order, if they were made known to it on receiving the freight from the preceding connecting company. In this case there is no question that the company had such knowledge when the cattle were received. The destination and the name of the consignee appear upon the way-bills given at Waverly. There were only two places at which the cattle were, on their way from Chicago, reshipped, that is, taken from the cars, and, after a short interval of rest, replaced. Waverly was one of these places, and when they were reshipped there these way-bills, with a designation of the destination and consignee of the cattle, were made out.

The indorsement by Myrick to the plaintiff, the Commercial Bank of Chicago, of the receipts, taken on the shipment of the cattle, transferred their title, and gave to the bank the right to their possession, and, if necessary, to sell them for the payment of the drafts. The fact that the railroad company at Philadelphia had been in the habit of delivering cattle, transported by it, to the Blakers through the drove-yard company, without requiring the production of any bill of lading or receipt of the carrier given to the shipper, or any authority of the shipper, in no respect relieved the company from liability for the cattle in this case. It was not shown that the shipper or the bank which took the draft against the shipment, or its correspondent at Newtown in Pennsylvania, had any knowledge of the practice, and, therefore, if any force can be given to such a practice in any case, it cannot be given in this case where the party sought to be affected had no knowledge of its existence. In Bank of Commerce *v.* Bissell, cited above, the defendants offered to prove a custom in New York to deliver property under bills of lading to the person who was to have notice of its arrival. The evidence was rejected, and the court of appeals held that there was no error in its rejection, stating that if the custom were established it could not subvert a positive, unambiguous contract.

Custom as to delivery without production of bill.

Numerous other assignments of error are presented for which a reversal of the judgment is asked, but the propositions of law embodied in them were not urged in the court below, and, therefore, the fact that the court did not rule upon them constitutes no ground for interference with the judgment. The one exception taken was to the direction of the court upon the evidence to find a verdict for the plaintiff for the amount claimed. To that direction the defendant excepted, and it is at liberty to show, either that there was sufficient evidence to go to the jury, or that questions of law apparent upon the record would control the case in opposition to the direction. But this it has not done.

As before stated, there was no conflict in the evidence, and the law upon it was clearly with the plaintiff.

The judgment is therefore affirmed.

Delivery of Goods Without Requiring Production of Bill of Lading.—See, *ante*, Pennsylvania R. Co. *v.* Stern, 551, and note, 554–556.

MERCHANTS' DESPATCH TRANSPORTATION CO.

v.

HATELY *et al.*

(14 *Supreme Court, Canada*, 572.)

Carriers — Connecting Lines — Bills of Lading — Terms of Contract — Custody of Goods—Delivery—Negligence.—The M. D. T. Co. through one B. contracted with H. to carry a quantity of butter from London, Ontario, to England, and bills of lading were signed by B., describing himself as agent severally but not jointly, for the G. W. R. Co., the M. D. T. Co., and the G. W. S. S. Co. named as carriers therein. The G. W. R. Co. were to carry the goods from London to the Suspension Bridge, the M. D. T. Co. from the Suspension Bridge to New York, and it was then to be delivered to the S. S. Co. for carriage to England. It was provided by one clause in the bill of lading that if damage was caused to the goods during transit the sole liability was to be on the company having the custody thereof at the time of such damage occurring. The butter was carried to New York where it was taken from the car and placed in lighters owned by the M. D. T. Co. to be conveyed to the steamer "Dorset" belonging to the S. S. Co. On arriving at the pier where the steamer lay the lighter could not get near enough to unload, and the stevedore in charge of the steamer had it towed across the river with instructions for it to remain until sent for. The "Dorset" sailed without the butter which was sent by another steamer of the S. S. Co. some five days later. The butter was damaged by the heat while in the lighter. *Held*, affirming the judgment of the court below, that the M. D. T. Co. having made a through contract for the carriage of the goods they were liable to H. for the damage, and even under the bill of lading were not relieved from liability as the butter was never delivered to, and received by, the S. S. Co. but was in the custody of the M. D. T. Co. when the damage occurred.

APPEAL from a decision of the Court of Appeals for Ontario, 12 Ont. App. R. 201, affirming the judgment of the Divisional Court, 4 O. R. 723, in favor of the plaintiff.

The facts of the case as far as they affect the appeal to the Supreme Court may be stated as follows.

The plaintiff, Hately, was an extensive shipper of butter and cheese from London, Ont., to England, and in August, 1881, he applied by telegram to the agent of the Merchants' Despatch

recover for the loss of a jack, while in transportation by defendant.

Dodge & Johnson for appellant.
Scott & Jones for appellees.

BATTLE, J.—This is an action by Weakly & Gooch against the St. Louis, Iron Mountain & Southern R. Co., to recover the value of a jack that died while in the course of transportation over defendant's railway. The facts, as shown by the testimony, were substantially as follows: On the 22d of December, 1884, plaintiffs shipped, at Nashville, Tenn., by the Nashville, Chattanooga & St. Louis R., a car-load of jacks consigned to themselves at Fort Worth, Tex. They were to be shipped by way of Memphis, over the Memphis & Little Rock R. to Little Rock, and thence over defendant's road to Texarkana. A written contract was entered into, whereby the Nashville, Chattanooga & St. Louis R. Co. agreed to transport the jacks to its freight station at McKenzie, ready to be delivered to the consignee, or his order, or to such company or carrier whose line might be considered a part of the route to the destination of the stock; and, in consideration of reduced rates of freight, it was agreed that, if any damage occurred by which the carrier was liable, the amount claimed should not exceed $300 for each jack injured. The stock, in charge of Gooch, one of the plaintiffs, arrived at Memphis on the morning of the 24th of December, 1884. At Memphis the river was then impassable on account of ice, and Gooch was delayed a day. The agent of the Memphis & Little Rock R. told him his stock could go forward on the Kansas City R. at 9 o'clock the next morning; and on the next day, the 25th of December, he took his stock to the Kansas City R. depot. The stock was driven on the cars a few moments before the train started. About this time a live-stock contract with the Kansas City, Fort Scott & Gulf and the Kansas City, Springfield & Memphis R. Co. was presented to him for his signature, which he signed without reading, supposing it was a pass for himself. So much of it as is necessary to mention in this opinion is in the words and figures following:

Facts.

"MEMPHIS STATION, December 25, 1884.

"Agreement made between the Kansas City, Fort Scott & Gulf and Kansas City, Springfield & Memphis R. Cos., of the first part, and Weakly & Gooch, of the second part, witnesseth, that whereas, the Kansas City, Fort Scott & Gulf and Kansas City, Springfield & Memphis R. Cos., as common carriers, transport live-stock as per tariff, now, in consideration that said parties of the first part will transport, for the party of the second part, one (1) car-load of jacks from Memphis to Fort Worth, Tex.,

and there deliver to the Kansas City Stock-yard Co. at the rate of seventy-six (76) dollars per car-load, the same being a special rate, lower than the regular rate mentioned in said tariff between said points, said party of the second part hereby relieves said parties of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be that of only a private carrier for hire. And the said party of the second part . . . hereby assumes all risk of injury which the animals, or either of them, shall receive in consequence of any of them being wild, unruly, or weak, or by maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the cars, . . . or of loss or damage from any other cause or thing not resulting from the negligence of the agents of the said parties of the first part. And the said party of the second part further agrees that he will load and unload said stock at his own risk, and feed, water, and attend to the same at his own expense and risk, while in the stock-yards of the parties of the first part awaiting shipment, and while on the cars, or at feeding or transfer points, or where it may be unloaded for any purpose. And it is further agreed that the parties of the second part will see that said stock is securely placed in the cars furnished, and that the cars are safely and properly fastened, so as to prevent the escape of said stock therefrom. . . . And it is further agreed that in no case shall the said railway companies be liable for a greater amount than fifty dollars per head of live-stock hereby shipped, and that all of the above rules and regulations for the transportation of live-stock shall be deemed an essential part of this contract. . . . The evidence that said party of the second part, after a full understanding thereof, assents to all the conditions of the foregoing contract, is his signature thereto.

E. A. THRUSTON, Agent of the Companies.
WEAKLY & GOOCH, Shippers.

"Witness: L. L. CRISP.
"(Pass one.)
"Executed in duplicate."

No charges were demanded or paid by plaintiffs for transporting Gooch and the stock over the railroads, except $116 at Nashville. The stock was shipped over the Kansas City, Springfield & Memphis R. to Hoxie, a station on defendant's road 121 miles north of Little Rock. The station agent at Hoxie testified that the car-load of jacks was received by defendant at Hoxie over the Kansas City, Springfield & Memphis R. under the contract of shipment made at Memphis, and was transported to Texarkana under the same contract. Gooch accompanied the stock, riding on the same train with them. The

stock arrived at Little Rock in good condition. Shortly after leaving Little Rock, the conductor called on Gooch for his contract, and he handed him the Nashville contract, but the conductor refused to accept it, saying it did not pass him free. He then handed the conductor the contract signed at Memphis, which the conductor took, read, and returned, and permitted him to ride upon it. A short distance north of Prescott, Gooch got out to examine his stock, and found a tramp in the car with them; and, after the train had started, he told the conductor about seeing the tramp. When the train stopped at the next station, the tramp was taken out of the car; and was permitted to go into the caboose to warm, it being cold and sleeting. He had a stick. Over the objection of defendant, a witness was allowed to testify that when the tramp went into the caboose, and sat down by the stove to warm, he said, in the presence of the conductor: "It is d——n cold; and if it had not been for lopping them mules over the head, I would have froze to death." Gooch got out several times between Little Rock and Texarkana to look at his stock, and found them standing, and apparently all right. He did so after seeing the tramp among them, and a short time before they reached Texarkana, and discovered nothing wrong until they arrived at Texarkana, when he found one of the jacks lying dead in the middle of the car, with blood running out of his nose and mouth. He saw no marks of blows or bruises on the animal. Its skin was unbroken. He road on the same train with the stock, according to his contract, from Hoxie to Texarkana, and testified he did not know the cause of the death. He testified that the dead jack was a fine animal, blooded, and of good pedigree, and was worth at Nashville $600, and at Fort Worth $800. When the other jacks reached Fort Worth, plaintiffs presented the contract signed at Memphis, and on it demanded and received their stock. Plaintiffs recovered judgment for $300, and defendant appealed. The declaration of the tramp was inadmissible. It was no part of the *res gestæ*, and appellant should not be affected by it.

Declaration of tramp inadmissible.

Appellant asked and the court refused to instruct the jury as follows: "The court instructs the jury that if they find from the evidence that the plaintiff signed the bill of lading or contract of shipment in evidence, by which said car-load of jacks was carried from Memphis, Tenn., to Fort Worth, Tex., via Hoxie, it matters not if plaintiffs did not read or understand the same. The fact that they signed the same is conclusive, unless said signatures were obtained by fraud on the part of the carriers making the contract. It was plaintiffs' duty to know, and they were bound to

Instructions refused and given.

know, what the contract contained and meant; and the effect of all its terms and conditions." But, at the instance of appellees, did instruct them as follows: "Unless the jury find from the evidence that the 'Memphis contract,' so called in the evidence, was made by the defendant with the plaintiffs for a valuable consideration, they will disregard the same; and, if they find that the same was signed by the plaintiffs under the supposition alone that it was only for the purpose of having his jacks shipped from Memphis to a point on defendant's line of railway where the original or Nashville contract would have carried the same, they may entirely disregard said Memphis contract, unless they believe the injuries received by said jacks were received between Memphis and Little Rock." Appellant also asked and the court refused to instruct as follows: "If the jury find from the evidence that plaintiffs entered into a written contract at the city of Memphis with the Kansas City, Fort Scott & Gulf and the Kansas City, Springfield & Memphis R. Cos., by which it was agreed that said railroads should carry their car-load of jacks from Memphis to Fort Worth, Tex., at reduced rates as a private carrier, and, upon certain agreed values of said stock, upon a limited liability; that the defendant was and is a connecting carrier of said railroads, and that, to carry out the contract, it was necessary to carry said stock on defendant's railway; that said defendant received and carried said stock under said contract,—then, in that event, the court instructs you that as said bill of lading was a through bill of lading, expressing upon its face a rate of freight to be charged by all the connecting lines from Memphis, Tenn., to Fort Worth, Tex., the destination of the stock, then its contract for exemption from liability innures to the benefit of the owners of all the lines of the whole route, including defendant company; and if, therefore, they find that there was such a contract, they must find that the same was for the benefit of this defendant, and must control in this case." Did the court err in giving the instructions asked for by appellees, and in refusing those asked for by appellant? At common law a common carrier, in the absence of a contract limiting his liability, is responsible for any loss or damage, however occasioned, unless it was by an act of God or a public enemy. He is bound to receive and carry all the property offered for transportation, if it be of that character which he carries for the public, subject to the responsibility incident to his employment, and is liable to an action if he refuses. He cannot relieve himself of such responsibilities except by contract with the shipper, based upon a consideration. He cannot limit his liabilities by an act of his own, and can only do so by the assent of the parties concerned. Taylor *v.* Railroad Co., 39 Ark. 148, 157;

Limitation of carrier's liability.

Railroad Co. *v.* Manufacturing Co., 16 Wall. 318, 328; Gaines *v.* Insurance Co., 28 Ohio St. 418, 14 Amer. R. Rep. 158. Appellees contend that they never assented to the limitations of the liabilities of appellant contained in the contract signed at Memphis, because they signed it without reading or hearing it read, and under a mistake as to its contents. But this will not relieve them from the contract, unless it was procured by fraud or imposition. It has generally been held by the courts in this country and in England that such contracts are binding on the shipper, although he did not read or hear them read before signing, provided the carrier resorted to no unfair means, and practiced no fraud or imposition, and the shipper had the opportunity to know the contents. As said by Hutchinson on Carriers: "There is nothing unreasonable in this. Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind, and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him, or sued him for his refusal, after tendering a reasonable sum for his services and risk." Hutch. Carr. § 240; McMillan *v.* Railroad Co., 16 Mich. 79; Squire *v.* Railroad Co., 98 Mass. 239; Long *v.* Railroad Co., 50 N. Y., 76; McIlroy *v.* Buckner, 35 Ark. 555; Hallenbeck *v.* Dewitt, 2 Johns. 404; Rice *v.* Manufacturing Co., 2 Cush. 80, 87; Harris *v.* Story, 2 E. D. Smith, 363, 367; Lewis *v.* Railway Co., 5 Hurl. & N. 867; Cooley, Torts, 488–491; Greenfield's Estate, 14 Pa. St. 489, 504; Hunter *v.* Walters, L. R. 7 Ch. 75, 82, 84; Morrison *v.* Construction Co., 44 Wis. 405, 409; Fuller *v.* Insurance Co., 36 Wis. 599, 603; Long *v.* Railroad Co., 3 Amer. R. Rep. 350; Mulligan *v.* Railway Co., 2 Amer. R. Rep. 322, 328; Grace *v.* Adams, 1 Amer. Rep. 131, 100 Mass. 505. But in this case the Kansas City, Fort Scott & Gulf and the Kansas City, Springfield & Memphis, and the St. Louis, Iron Mountain & Southern R. Cos. were not parties to the contract made at Nashville. The stock was to have been transported, by way of Memphis, over the Memphis & Little Rock R. to Little Rock, and from there to Texarkana. When it arrived at Memphis, it was ascertained it could not be shipped over the Memphis & Little Rock road without delay, and appellees determined to ship it over another and much longer route, and for that purpose entered

Contract signed by shipper without reading.

into the contract signed at Memphis. Under this contract the stock and one of the appellees were carried from Hoxie to Texarkana, and the stock was delivered to its owners at Fort Worth. Appellant acted under and was governed by it in carrying the stock. If the contract signed at Memphis was procured by fraud, and appellees were unwilling to be governed by it, they should have so informed appellant before the delivery of the stock to its agents. They were then in a situation to correct any mistake or misunderstanding in the terms of the shipment, and definitely adjust its terms. But, having failed in this, they cannot make appellant suffer the consequences of their negligence. If a fraud was committed in the procurement of the contract at Memphis, their negligence enabled the perpetrators to succeed in its commission, and they should bear the loss occasioned by it, if any. The Kansas City, Fort Scott & Gulf, and the Kansas City, Springfield & Memphis R. Cos. contracted with appellees to transport their stock from Memphis, Tenn., to Fort Worth, Tex. The appellant, by receiving the stock, became their agent to complete their contract to the extent of shipping the stock over so much of its road as formed a part of the route over which the shipment was to be made. From this fact the law implied a privity between the parties to this action sufficient to enable appellees to sue appellant for any losses sustained by reason of its failure to perform the contract, and gave to appellent the benefit of all valid limitations contained in the agreement upon the carrier's liability; so that, while the burdens were imposed, the benefits of the limitations in the contract inured to appellant. Taylor *v.* Railroad Co., 39 Ark. 148, 158; Halliday *v.* Railway Co., 74 Mo. 159, 6 Am. & Eng. R. R. Cas. 433; Hutch. Carr. §§ 251, 252, 254, 256.

Shipper's negligence in not objecting to contract.

Benefits of limitation inured to appellant.

Appellant contends that the court below erred, because it asked and the court refused to give an instruction in the following words: "If the jury find from the evidence that the plaintiffs entered into a contract with defendant, or its connecting carrier, whereby it was agreed that in no case should the carriers be liable for a greater amount than fifty dollars for each stock or animal shipped therein, then they are instructed that, if they find that the defendant is liable at all in this action, their verdict cannot exceed the sum of fifty dollars." In the Memphis contract the liability of the carrier for losses or damages was limited to $50 for each jack injured. Should the instruction limiting the liability of appellant to $50 have been given? In Railroad Co. *v.* Lockwood, 17 Wall, 357, it was held: "A common carrier cannot lawfully stipulate for exemption from re-

Limitation of liability to certain amount—Reasonableness.

sponsibility when such exemption is not just and reasonable in the eye of the law." Hart *v.* Railroad Co., 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604, was an action like this. In that case the property received for shipment was five horses, and the extent of the carrier's liability agreed upon for each horse was $200. By the negligence of the carrier one of the horses was killed, and the others were injured. The plaintiff proved the horses were race-horses, and offered to show damages, based on their value, amounting to over $25,000. The testimony was excluded, and he had verdict for $1,200. On writ of error brought by him, it was held that the evidence was not admissible; that the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; and that the terms of the limitation covered a loss through negligence. Mr. Justice Blatchford, speaking for the court, said: "This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and when there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." Railroad Co. *v.* Henlein, 52 Ala. 606, was an action against a carrier on a contract to

carry live-stock, in which the extent of the carrier's liability was limited to $50 to each animal. The court said: "We have had much difficulty in determining the validity of the stipulation in the contract, that, if loss or injury should occur, for which the company is liable, the amount claimed should not exceed fifty dollars for any one of the animals. If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal and the amount of freight received, we should not hesitate to declare it unjust and unreasonable. But, as the case is presented, it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier against exaggerated or fanciful valuations. We cannot, therefore, presume it unjust and unreasonable, and it is the measure of appellant's liability." There are other decisions to the same effect as those cited. See Railroad Co. *v.* Henlein, 56 Ala. 368; 19 Am. Ry. Rep. 200; Harvey *v.* Railroad Co., 74 Mo. 538; s. c., 6 Am. & Eng. R. R. Cas. 293; Magnin *v.* Dinsmore, 62 N. Y. 35. But all the decisions upon this question are not in harmony. They are cited and reviewed to some extent in Hart *v.* Railroad Co., *supra*. After a review of them the court reached the result as above stated. In Railway Co. *v.* Lesser, 46 Ark. 236, this court followed the decisions of the supreme court of the United States in Railroad Co. *v.* Lockwood, and Hart *v.* Railroad Co. In that case the carrier transported a car-load of mules over its road under a contract which limited its liability to $100 to each horse or mule. One of the horses, to the value of $150, was injured. This court held that the damages the shipper was entitled to recover in that case was the proportion of $100 the horse was lessened in value by reason of the injury.

As a general rule, the common carrier is bound to receive and carry that which is offered to him for transportation. He ought to be entitled to a reasonable reward for his services. As the risk of conveying property of considerable value is greater than that of small value, the care required is, and the reward should be, greater. It is therefore reasonable and right that the value of the property shipped should be ascertained, in order that the carrier may know the extent of his responsibility, and the care and attention required, and fix the amount of his reward. As aid by Lord Mansfield in Gibbon *v.* Paynton, 4 Burrows, 2298: "His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionate to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other method of security, and therefore he ought, in reason and justice, to have a greater reward." If, therefore, the measure of the liability of the carrier as agreed upon is adjusted by the re-

ward to be received by the carrier under his contract. and the contract of shipment is fairly entered into. and no deceit is practiced upon the shipper, the contract is reasonable as to the measure of liability, and should be upheld. Inasmuch as the measure of appellant's liability, in the stipulations contained in the Memphis contract, is stated to be based on reduced rates of freight paid for the transportation of the stock, it must be presumed, in the absence of evidence to the contrary, that the rate of freight was graduated by the valuation agreed upon as the limit of the carrier's liability, and was reduced under the regular rates, in consequence and consideration of the terms or stipulations of the contract. Railway Co. *v.* Lesser, 46 Ark. 236.

As to the burden of proof, the circuit court instructed the jury, at the instance of appellees, as follows: "The jury are instructed, as matter of law, that, whenever a common carrier seeks to avoid a liability for losses on account of contract limiting its liability, the burden of proof, as a general rule, is upon it, not only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in the contract; and this fact must be established with reasonable certainty, and not rest upon conjecture or possibility. So, in this case, if defendant seeks to avoid its liability for the death of the jack sued for, under a clause of their contract of shipment exempting the company from such liability for injury to said jack caused by the animals shipped in the car with him, or on the ground that the death of said jack was caused by the inherent vices and propensities of such animals, the burden of proof is upon the defendant to show that the death of said jack was caused by other animals in the car, or their inherent viciousness." And, at the instance of the appellant, as follows: "If the jury find from the evidence that plaintiffs' stock was received and transported under a written contract or bill of lading, wherein it was stipulated or agreed that the owners or their agents should ride upon the freight trains in which said stock was being transported, and that they should load, transport, feed, and care for said stock while on the cars, or at feeding, transfer, or other points; and if they further find that plaintiff, J. S. Gooch, one of the owners of said stock, did accompany the said stock, and was upon the same train upon which the stock was at the time said animal died, and that said contract exempted the carriers from all liability from injury to said stock,—then you are instructed that, by virtue of said exemption in said contract contained, the burden of proof is upon plaintiffs to show that said animal was killed by or through the negligence or fault of this defendant; and if you find that no evidence of negligence has been offered showing, or tending to show, that defendant was at fault, then you must find for the

Same—Burden of proof.

defendant." These instructions are inconsistent with each other; and the one given at the instance of the appellees is misleading, and not applicable to the facts in this case. In Railway Co. *v.* Lesser, supra, it is said: "Whenever a common carrier seeks to avoid a liability for losses on account of a contract limiting his liability, the burden of proof, as a general rule, is upon him, and only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in the contract." But this court has never applied this rule to any case except those in which the loss was caused by fire or like causes, against which the carrier was an insurer at common law. It did not, in Railway Co. *v.* Lesser, undertake to say to what class of cases it is applicable. Does it govern in this case? At common law a carrier is held to the strictest accountability. The reason is, when goods are placed in his care for transportation, the shipper is dependent on him for their safe-keeping and delivery. He seldom goes or sends any one to protect his interest. His necessities often compel him to rely solely on the carrier. If the goods are lost through the grossest negligence of the carrier or his servants, or stolen by them, or others in collusion with them, he is unable to prove it by any one except the carrier's servants. Under these circumstances, the ability of the owner to sustain an action against the carrier for damages is necessarily uncertain, and sometimes impossible. To give due security to the owner, and to insure the utmost good faith and diligence in the carriage and delivery of freight, the common law imposes upon the carrier the responsibility of an insurer against all losses except those occasioned by the act of God or the public enemy; and, in case of damage or loss, requires him to show the cause. To exonerate himself from liability the burden of proof is upon him to show that the loss or damage was caused by the act of God or the public enemy. This rule of evidence is the necessary result of the common-law liability, and the circumstance that the cause of the loss is presumed to be peculiarly within the knowledge of the common carrier. But in this case there was a restriction upon the common-law liability of the carrier. Appellees agreed to load the cars with the stock, and unload, feed, water, and attend to them, at their own expense and risk, while in the stock-yards of the carriers awaiting shipment, and on the cars, or at feeding or transfer points, or when the same might be taken off the cars for any purpose, and to see that the cars were securely fastened; and for that purpose one of them was allowed to ride, and did ride, on the train with the stock from Hoxie to Texarkana, free of additional charge. Under the contract, they took charge of the stock during transportation, and relieved appellant of any responsibility for the dis-

charge of these duties of a common carrier which they undertook to perform, and confined its duties, by the Memphis contract, to the furnishing suitable cars, and hauling them to the place of destination. Having the care of the stock, the liabilities of a common carrier which make it his duty to account for the loss of freight did not devolve on appellant. Being in charge, they were presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause before they can be entitled to recover. Railroad Co. *v.* Hedger, 9 Bush, 645, 651; Clark *v.* Railway Co., 64 Mo. 441, 448; Harvey *v.* Rose, 26 Ark. 3; Railway Co. *v.* Reynolds, 8 Kan. 623, 641.

For the errors indicated, the judgment of the court below is reversed, and the cause is remanded for a new trial.

Carriers Limiting Liability by Contract.—See, *ante*, Block *v.* Merchants' Despatch Transportation Co., 579, note, 601.

Same—Connecting Lines—Agreements Between.—See, *ante*, Palmer *v.* Chicago, Burlington & Quincy R. Co., 629, note, 635.

Limitation of Liability to Certain Amount.—See, *ante*, Block *v.* Merchants' Despatch Transportation Co., 579, and note, 601.

When Contract Limiting Liability Insures to Benefit a Connecting Line.—Burroughs *v.* Grand Trunk R. Co., 32 Am. & Eng. R. R. Cas. 467, note 474.

BIERS *et al.*

v.

WABASH, ST. LOUIS AND PACIFIC R. CO. (Chicago, Burlington & Quincy R. Co., Intervenor.)

(*United States Circuit Court, N. D. Illinois, March* 14, 1888.)

Common Carriers—Connecting Lines—Boycotts.—A railroad doing business as a common carrier has no right to refuse to deliver to, or receive from, a connecting railroad, cars of such connecting line, either loaded or empty, or freight of any kind which is ordinarily transported between railroad companies according to the proper and usual course of business; and it is no excuse for the action of a railroad company in so refusing cars or freight properly offered that the receiving of them might or probably would involve the company in a strike and boycott of employees, which exists on and against the road from which it so refuses to receive the cars or freight.

Same—Receiver—Duty to Receive.—The receiver of a railroad company who controls its operation is no less a common carrier because the property of the road is in the custody of the court; and as such carrier he is obliged to receive and transport cars and freight, and to furnish accommo-

dations to connecting lines, to the same extent and in the same manner as are the proper officers of other railroad companies.

IN Equity.—*In re* petition of the Chicago, Burlington & Quincy R. Co. for a peremptory order to the receiver of the Wabash, St. Louis & Pacific R. Co., to compel him to receive through freight cars from the petitioner and transport them.

Writ Dexter and *Henry Crawford* for intervenor.

Isham, Lincoln & Beale, and *George W. Smith* for receiver.

GRESHAM, J.—The Chicago, Burlington & Quincy R. Co., with leave of the court, filed its petition in this suit, charging that until a recent date the receiver of the Wabash property freely interchanged cars with the petitioner, and all other companies having lines of road entering the city of Chicago; that on the 6th of March the petitioner tendered to the receiver's usual agent, at the usual place of delivery at Chicago, eight cars loaded with grain, the same being destined for delivery at points on, or to be shipped over the lines in the receiver's custody; that some of these cars belonged to the petitioner, some to other companies, and one to the receiver, and all were loaded for continuous passage, either at points in Illinois, and destined to points outside of that State, or loaded at points outside of the State of Illinois, and destined for continuous passage to points within the State, the proper expense bills being tendered to the receiver's agent, who, acting under express orders of the receiver, refused to receive, transport, or deliver such cars, or any others; that this action of the receiver's agent was in obedience to instructions from the receiver directing his agents and employees to receive no loaded cars from, and to deliver no loaded cars to, the petitioner, and to cease all traffic relations with it; and that the receiver's agents at other points of junction of the railways under his charge and those of petitioner, when applied to, informed the agents of the petitioner that they were under specific order to neither deliver to nor receive from the petitioner cars loaded with freight. The petition further charges that the receiver's agents and employees gave as the sole reason for refusing to so interchange freight that the receiver's switching and other engineers had notified him that they would handle no freight cars coming from or going to the lines of the petitioner; that such engineers belonged to the Brotherhood of Locomotive Engineers, whose grand chief engineer, or Committee of Grievance, had notified all engineers belonging to such Brotherhood to refuse to handle cars coming from or going to the petitioner, and that in compliance with this action of such engineers the receiver had issued the instructions already named; that the Brotherhood of Locomotive Engineers have secretly resolved that a boycott shall be put

Allegations of petition

into effective force against the petitioner over all its system, and all intercourse or exchange of cars between it and other connecting railroads, including the lines in the custody of this court; that P. M. Arthur, as the chief executive officer of the Brotherhood, has been in Chicago for 10 days, giving aid and directions to the members of the Brotherhood; and for the purpose of injuring the petitioner's business, and rendering it impossible for it to discharge its duties as a carrier, he has issued instructions to the members of the Brotherhood employed by the receiver not to allow their engines to be used in hauling cars going to or coming from the petitioner's line of railroad; and that the action of the receiver and his subordinates, in refusing to exchange loaded freight cars with the petitioner, was the result of moral duress thus created by the Brotherhood, including the engineers in the receiver's service. The prayer of the petition is that a peremtory order be issued directing and requiring the receiver and his subordinates to interchange business with the petitioner according to usage; and to abstain from the declared policy of non-intercourse with the petitioner; also that the Brotherhood of Locomotive Engineers, its officers, agents, and committees, be enjoined from issuing any orders or instructions to any of the engineers in the service of the receiver as to what cars they shall haul over the Wabash tracks, and that such association and its officers, and especially P. M. Arthur, be required to show cause why they should not be punished for contempt in interfering with the property in the custody of the court.

The receiver's answer admits the existence of the usage of interchanging loaded cars between himself and the petitioner, but avers that such interchange has been small; the receiver's receipts therefrom during the month of January being less than $500. The answer avers that the petitioner owns and operates a system of railways occupying much of the territory tributary to the lines of the Wabash Company, and that the two systems are directly competitive at many important points. The answer admits that the receiver's agents declined to receive and haul the eight cars tendered as stated in the petition; but avers that at the time of such tender and refusal the receiver had issued no orders, and given no instructions whatever to his agents or employees, with respect to the interchange of business with the petitioner; but admits that on the day following such tender and refusal the receiver issued instructions to his agents to receive no cars of the petitioner for the present, but to transfer from the cars of the petitioner all freight tendered to the Wabash, and to take no freight originating on the petitioner's system, except as local freight. These instructions were issued, the answer avers, because there was danger that a continuance of interchange of

Receiver's answer.

business would cause the Wabash engineers to leave the receiver's employment, and thus inflict great injury upon the property in his custody; that the instructions were only for a temporary suspension of interchange of cars between the receiver and the petitioner, and that the receiver never announced any absolute and permanent policy of non-intercourse; that on the 10th of March (two days after the petition was filed) the receiver promulgated to the officers and employees in his charge the following order:

"All orders and directions heretofore given by me, or by any officer or agent of this road, which have been understood as limiting the interchange of cars or traffic with the Chicago, Burlington & Quincy R., or any of the roads in that system, are hereby rescinded: The business of receiving and exchanging cars and traffic by this road with the C. B. & Q. R. Co., and all of the roads of that system, will go on upon the same terms and conditions as those upon which similar business is done by this road with other connecting railroads."

It is averred in the answer, and by the receiver and his counsel in open court, that this order will be enforced in the future. It is further averred that the receiver consulted no one except his subordinates as to the propriety of issuing and enforcing the rescinded instructions; and that he has had no communication or conversation with P. M. Arthur, or any one representing him, respecting the operation of the Wabash R.; and it is denied that the receiver has acted under moral duress exercised by P. M. Arthur, or anybody representing or connected with him, or that Arthur has ever in any manner obstructed the management or operation of the property in custody of the court. The answer concludes with the statement that the receiver believes this proceeding was originated, not so much from a desire to procure a resumption of the unimportant traffic of the petitioner with the respondent, as in the hope that the filing of the petition, and action thereon, would render the receiver incapable of managing the Wabash property, and that a large amount of the business now done by it would go to the petitioner as a competitor.

Receiver's rights and duties as a carrier.

Although the property of the Wabash Co. is in the custody of the court, it is operated by the receiver as a common carrier. His rights and duties are those of a carrier. He is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic. It is his duty to receive from and deliver to other connecting roads both loaded and empty cars. He cannot discriminate against one road by maintaining a policy of non-intercourse with it. More need not be said on this question, as the receiver has wisely rescinded the instructions which discrimi-

nated against the petitioner, and declares he has no purpose or desire to deny to the petitioner any of its legal rights. Although the petitioner has accomplished its chief purpose in invoking the aid of the court, it is urged by its counsel that persons belonging to the Brotherhood of Locomotive Engineers, and especially P. M. Arthur, who is the chief officer of that organization, have interfered with the receiver and his subordinates in the management of the Wabash property, and that they should be punished for their illegal and contumacious conduct. The receiver and his counsel make no such complaint. On the contrary, the receiver declares that there has been no such interference with him. While the affidavits submitted in support of the petition show that Mr. Arthur sent a telegraphic message to the engineers of the Union Pacific R. Co. at Omaha, directing them to haul no cars of the petitioner, it does not fairly appear from the evidence that the engineers in the service of the receiver received such orders by telegraph or otherwise. For the present it is sufficient to say that the court will protect the property of the Wabash Co. in its custody. The employees of the receiver cannot be obliged to remain in his service against their will, but neither they nor others will be permitted to interfere with or disturb the receiver or his subordinates in the possession and operation of the property in his custody. Lawless interference with the receiver and his employees in the discharge of their duty will not be tolerated. It is proper to state, however, in justice to the Wabash engineers, that they do not desire to maintain an attitude of defiance to the law, and that they are now willing to aid the receiver in the lawful and successful administration of his trust. The receiver's answer renders it unnecessary for the court to do more than direct that the petition remain on file for future action should there be occasion for it.

Connecting Lines—Duty to Receive.—In Chicago, Burlington & Quincy R. Co. *v.* Burlington, Cedar Rapids & Northern R. Co. *et al.*, 34 Fed. Rep. 481, it was held that the duty imposed upon railroad companies by the Interstate Commerce Act, of receiving from connecting roads freight and passengers, is one which the Federal courts will enforce by mandatory injunction where the injury resulting from its non-performance is continuing; and it was further held, following the case of the Wabash R., that a strike of locomotive engineers and firemen upon the petitioner's road, causing a boycott against it by the engineers and firemen of all other lines, defendant's included, and endangering a strike on defendant's line if it receives cars from plaintiff, is no excuse for refusal to receive them. The court say that the railway service is a *quasi* public business. "The building, equipping, and management of a railway is not strictly a private enterprise. It would not be authorized by the government solely for private profit. That could not be done within the law of eminent domain. The railway company, and all who are engaged in the building, equipping, repairing, and keeping open a railroad as a public highway, are performing one of the great duties of the government. The government for the time

being commits to them for the benefit of the whole people a business—a public duty—in the performance of which the people have an interest which is simply incalculable. It is clearly the duty of the government in all its departments, within their respective spheres, to enforce, upon all persons engaged in a business which thus concerns the public welfare, the strict performance of their duty to the public. The stoppage of the running of a system of railways for weeks and months at a time must inevitably inflict enormous injury upon the great public, for whose convenience and use railways are authorized. By the non-operation of a railroad travel may be suspended; the merchant and manufacturer ruined for want of transportation; property of incalculable value laid up to perish by the way; whole communities deprived of their supplies of fuel and the other necessaries of life,—in a word, mischiefs and sufferings may be inflicted upon the people which no words are adequate to express. Who may arbitrarily, in consideration of their own private wrongs or interests, inflict such enormous evils upon the very public by whose license and for whose benefit railways have been authorized and established? Certain classes of men, for their own profit, engage in a *quasi* public service. They conceive themselves to be wronged, and they proceed to redress their own private wrongs by inflicting incalculable injuries and sufferings upon whole communities of people. This they claim a right to do, not only by quitting the service in which they are employed, but by giving to their leaders the power to order off all other men in the same line of employment from the similar service in which they are engaged. They thus claim the power, by the arbitrary and uncontrollable will of a few leaders, to suspend the operation of a whole system of railways covering vast regions of country! In their view, apparently, no one is concerned in such a transaction but themselves and the railway company! The great public—the millions and tens of millions of people who may be injuriously affected by such irresponsible proceedings—are left out of view and wholly ignored To redress the small wrongs of a few they inflict irreparable injuries upon the many.

"It would seem that the government ought in some way to protect the public against the evils growing out of such a suspension of railroad transportation. But the remedy for the intolerable injuries which threaten the public, as well as the complainant, in that direction, must rest mainly with the legislative department. The power of the courts is extremely limited. The action at law for damages is clearly no remedy at all, and the power of a court of equity is mainly preventive. The power of a court of chancery to enforce the performance of positive duties is circumscribed within very narrow limits. Thus, it cannot prevent the employees of a railway company from abandoning its service. However grievous may be the injury inflicted upon the railway company and the public by the sudden suspension of railway service over an entire system of railways, I see no remedy for it in the restraining power of equity. The court cannot prevent the railway employees from leaving their places, and it cannot compel them to return to work. But here a line must be drawn which the employees may not pass. If, having left the service of the company, the men attempt in any way by threats, or force, or violence, or intimidation, or unlawful combinations, to interfere with the free will of other men who may be inclined to take their places, or with the property of the company, or with those who are in the management of its affairs, for the purpose of preventing the company from doing its duty to the public as common carriers, the court may undoubtedly interpose its power of granting injunctions to prevent intolerable mischief. Such injuries would be clearly irreparable. There would be no adequate remedy at law. Actions at law would, in such cases, be simply futile; and even if effectual in particular

cases, they would be so multitudinous that the remedy would be as bad as the injuries to be remedied. The employees may quit the service of the company, and give place to other men. But it is a service that must be performed, and it must not be obstructed; and so long as the employees remain in the service, they are, like other men, bound by their contracts. They have assumed by contract to assist in the performance of a *quasi* public service,—a service the non-performance of which may be ruinous to the public,—and it is a serious question whether they may not be compelled while remaining in the *quasi* public service of operating a railway to perform their duty. But, since the company has the power of discharge, equity would not interfere by injunction, except in a clear case of special necessity. I wish to be understood as giving at present no opinion upon this point.

"In the next place, what disposition shall be made of the complainant's application for a mandatory injunction against the defendant company and its managing officers, compelling them to perform their duty as required by the law of both congress and the State of Iowa? These defendants have appeared by counsel and admitted the truth of the allegations of the bill, and they do not deny that they are required by law to receive and move the complainant's cars. They admit that they have refused to perform this duty, and they give as a reason for their refusal that, if they receive and haul the complainant's cars their firemen and locomotive engineers will abandon their service and leave the company without the means of operating their lines. There can, of course, be no doubt about the law of both the general and State governments requiring the defendant corporation to receive and move the complainant's cars, whether empty or loaded. The law of Iowa provides that it shall be the duty of any railway corporation to receive and transport the empty or loaded cars furnished by any connecting road to be delivered at any station or stations on the line of its road to be loaded or discharged, or re-loaded and returned to the road so connecting. 1 McClain's Ann. St., p. 367, § 10.

"The United States interstate commerce act (Act Cong., Feb. 4, 1888; St. at Large, 1885–87, p. 379) provides that every common carrier shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of property and passengers to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

"Now, the question is, what shall be obeyed,—the law of the land, or the order of the chiefs of the locomotive engineers? Shall a railway company refuse obedience to the express provisions of the statutory law because some of its employees threaten to quit its service, and thus stop the running of its trains? Shall the court presume that they will carry out such threats, and deny relief to the complainant upon that presumption? No temporary inconveniences to the defendant company, or the public whom it serves are, in my judgment, for one moment to be compared with the fatal consequences which must ensue from a precedent by which it would be established that a railway company may, in violation of the law of the land, refuse to receive and haul the cars of a connecting line at the command of any irresponsible persons, or from its own belief and apprehension that its employees will leave its service and stop the operation of its lines. Such an excuse as this is wholly inadmissible, and it must be set aside. If, in this case, the refusal of the defendant corporation to move the cars of the complainant be sustained, it will follow

that, whenever in the future the locomotive engineers and firemen shall enter upon a struggle with any one road, all other corporations having connecting lines will, in violation of law, be warned not to interchange cars with the offending road, and compelled to obey the behests of their employees. Thus may the transportation of vast regions of country covered by connecting lines be controlled and paralyzed at the arbitrary will and pleasure of the Brotherhood of Locomotive Engineers. Indeed, it seems to-day to be by the grace of the leaders of this association that the various corporations owning the vast network of railways west of Chicago are permitted to operate their lines. The people of this vast region may at any moment be deprived, by the arbitrary fiat of the association in question, of all railroad facilities. Is this a power fit to be assumed and wielded by any set of irresponsible men under the sun?

"There is another matter worthy of consideration by the defendant company. If it refuses to receive and move cars laden with goods or merchandise, will the company not be liable for any damages which may accrue to the owners and consignees of such shipments? Is it not the right of the citizen and owner of goods shipped to have their property received and transported by the defendant as a common carrier, and does not this right belong to the shipper by both the common and statute law? Suppose the goods, being perishable, should go to destruction by the way; suppose they be ordered for a special purpose, and fail to reach the consignee in time; suppose, by reason of the delay caused by the act of the defendant, there should be a heavy decline in the market, would not the defendant company be liable to the owner and consignee in damages?

"The injury complained of is clearly irreparable, except by the remedy now prayed for by the complainant. It is a continuing injury. It may occur every day, and many times a day. This complainant is a common carrier, and cannot refuse to receive and carry goods destined to persons living or doing business upon the defendant's line. Yet the complainant must either refuse to receive such goods, and abandon all its business connected with the defendant's line, or receive them and allow them to accumulate upon its own tracks, or in warehouses at the place of connection between the two roads."

Same—Mobs, Riots and Strikes.—See, *ante*, Haas *v.* Kansas City, Fort Scott & Gulf R. Co., 572, and note, 575.

GULF, COLORADO AND SANTA FE R. CO.

v.

MCCORQUODALE *et al.*

(*Texas Supreme Court, June* 5, 1888.)

Carriers—Contract of Carriage—Breach—Act of God.—A railroad company which has agreed to receive and transport cattle upon a certain day cannot plead an act of God which takes place after such day as a defence to an action for damages for a breach of the contract.

Same—Excuse—Lack of Cars.—A railroad company cannot excuse a breach of a contract to receive and transport cattle upon a certain day by the fact that it was so crowded with business upon that day and during

the time of the subsequent delay that it had no empty cars in which to receive the cattle.

Same—Evidence.—Where a railroad company pleads as a defence to a breach of an agreement to receive and transport cattle upon a certain day, that it was crowded with business and had no empty cars at its disposal, it is competent for plaintiff to show that empty cars not in use were standing at the point of shipment during the time of delay.

Same—Damages—Cost of Keeping—Depreciation in Market.—Where plaintiff seeks damages against defendant railroad company for breach of a contract to receive and transport cattle upon a specified day, caused by cost of keeping the cattle for the additional period, and by depreciation in the market price, it is incompetent for defendant to show that the depreciation in price was caused by failure of the cattle to conform to the standard, and not by the delay in shipment.

APPEAL by defendant from a judgment in favor of the plaintiff, in an action to recover damages caused by defendant's failure to fulfill a contract to furnish transportation for 592 head of cattle over defendant's railroad from Temple to Fort Worth, on May 19, 1884.

Heffly & Wallace for appellant.

Ford & Ford and *J. W. Doremus* for appellees.

ACKER, J.—Appellant had contracted to receive and ship the cattle on the 19th, and failed to comply with its contract. As a natural person would be, so it certainly is liable for any damages resulting to appellees by reason of its breach of contract. Railway Co. *v.* Nicholson, 61 Tex. 495. On the afternoon of the 18th, appellees informed appellant's agent at Temple that they were ready to deliver the cattle next morning, according to contract, and the agent instructed them to have the cattle at the pens next morning, and cars would be ready to ship them. When the cattle were tendered next morning at the pens, no cars were furnished, and appellant refused to receive them, but promised that cars would be furnished at once, and repeated this promise up to the afternoon of the 21st; thus inducing appellees to hold the cattle under herd near the pens until that time, when the agent of appellant informed appellees that there was a washout on the road between Temple and Fort Worth. Under this state of facts, it is contended that the delay in shipping the cattle, and the resulting damage, are attributable to the act of God in an unprecedented flood that broke appellant's road. It appears that this act of God was not committed until the afternoon of the 21st, two days after the breach of contract by appellant, and it also appears that the cattle would have passed the place of the break in the road had they been shipped at any time after they were tendered and ready to be shipped, up to the morning of the 21st. We do not think that appellant can avoid liability for damages resulting from the breach of contract,

Facts.

Breach of contract—Pleading act of God.

because of an act of God, after such breach, and we think the court did not err in so holding.

It is also contended that the court erred in refusing to permit appellant to prove that the cattle claimed to have been damaged had been sold by appellees, before they were shipped, to a party in Fort Worth, and that the reason the purchaser did not take them when they arrived in Forth Worth, on the 24th of May, was because they were not the grade of cattle represented by appellees, and not because they had been damaged by the delay in shipping. Now, we cannot see what this testimony could have to do with determining the issues in this case. If there was a contract, and a breach of that contract without legal excuse for such breach, the only remaining question was the extent of damage to these particular cattle. The question whether or not appellees had complied with their contract with a third party, that the cattle were of a particular grade, could shed no light on any issue in this case, and we think the court did not err in the ruling here complained of.

Evidence—Contract with third party.

The court permitted appellees to prove, over objection of appellant, that there were about 40 empty stock cars in appellant's yard at Temple when the cattle arrived there, and that these cars remained there until the 23d, when the cattle were shipped in a part of these same cars; and this is assigned as error. Appellant attempted to explain its failure to receive and ship the cattle, up to the time of the break in the road, upon the theory that it was greatly crowded with the business of carrying stock at that time, and could not get the necessary cars to Temple. But this would be no legal excuse for the breach of the contract; and we presume the court admitted the evidence in rebuttal of such evidence as had been offered in support of appellant's claim of inability to get the cars to Temple. There was no claim for exemplary damages, and none seems to have been given, and we do not think the evidence could have prejudiced the rights of appellant.

Excuse of want of cars.

The remaining assignment of error relates to the sufficiency of the evidence. Without reviewing the evidence, we think it sufficient to say that there was legal evidence to support the verdict, and the verdict certainly is not against the great preponderance of the evidence. In such case, it is well settled that this court will not disturb the verdict. There being no error in the judgment of the court below, we are of opinion that it should be affirmed.

Evidence sufficient.

STAYTON, C.J.—Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

Delay in Transporting Freight Caused by Unusual Press of Business.—See Houston, etc., R. Co. *v.* Smith, 22 Am. & Eng. R. R. Cas. 421, note, 427.

Carriers.—In Blodgett *v.* Abbott, 40 N. W. Rep. 491, the Wisconsin supreme court say, that in an action against a railroad company for damages occasioned by delay in carrying potatoes for plaintiff, the admission of the answer of defendant's agent at the connecting station, to the question whether he knew of any train on the connecting road, except the regular one leaving after a night's delay, is improper, as defendant cannot avoid liability by delays on the connecting road; and, being admitted over an objection that it was immaterial, the court may have given it weight, and the error is material, though there was no evidence of such delay.

The court say that the company "must aquit themselves of this duty, and they cannot shield themselves from it by delays on the connecting road. They are bound to know, when they so contracted, whether they could be carried through without such delay as would destroy or injure such perishable freight. Suppose that the car had never left Plover until the potatoes had become valueless by freezing, could the defendants escape liability by proof that there was no regular freight train on the other road to receive it before such time? Such is not the law. McLaren *v.* Railway Co., 23 Wis. 138; Trust Co. *v.* Case, 21 Fed. Rep. 885."

Same—Season of Shipment—Evidence of Conversation at Time of Contract.—It was further held, in Blodgett *v.* Abbott, *supra*, that the potatoes having been shipped at a season of the year when it was turning cold, exclusion of evidence as to what was said, when the contract of carriage was made, about the length of time it would require to reach the destination is error, since it might have been the inducement to the contract.

The court say: "The witness Carley was asked what was said at the time (meaning the time when the contract was made) in regard to the length of time it would require to reach Mosinee. The court sustained the objection of the defendants. This was a flagrant error. Considering the season of the year, and the perishable nature of this kind of freight by freezing, such statement might well have been the very inducement to the contract. There is so great a similarity between the action *ex contractu* and *ex delicto* in such a case, or of failure to perform the contract and to discharge the duty, that it is difficult to determine which it is. The difference is more in form than in substance. Such a statement might greatly affect the duty of the defendants and the conduct of the plaintiff. The agent Carley might have been governed by such a statement, in entering into the contract on behalf of the plaintiff; and his conduct in not giving this kind of freight more personal attention to protect it from injury on the way, and in having the consignees ready to receive it and take care of it on its arrival at the end of the route, may have been caused by it, and this the plaintiff offered to show. Without any such statement, if the defendants knew that the delay would be as it was, and that there were any reasons why the potatoes would not arrive at their destination until endangered by frost, and this they were bound to know (and they now claim that they did know that none but a local freight train could put that car on the "Y," and none but a regular freight train on the other road could or would take and forward it), then it was clearly their duty to have so informed the agent Carley before he entered into the contract or shipped them. Ayres *v.* Railway Co., 71 Wis. 372. Carley, the agent, notified the consignees that the car would arrive that night, and they were at the depot ready to receive and take care of them. A statement of the agent of the defendants, at the time, that the car would arrive that night at Mosinee, under such circumstances, would have the force of a contract to that effect. Strohn *v.* Railway Co., 23 Wis. 130. The agent had the authority to so contract, because such time of carriage would have been

reasonable for such freight at such a time. Wood *v.* Railway Co., 27 N. W. Rep. 473; Strohn *v.* Railway Co., 23 Wis. 130."

Same—Connecting Lines.—In Blodgett *v.* Abbot, *supra*, the court said, that, the evidence as to whether it was the duty of the conductor of the train in which the car went to Junction City to have placed it on the "Y" was most material, and ought to have been submitted to the jury. Leavitt *v.* Railway Co., 64 Wis. 228.

As to Connecting Lines and Liability, see Alabama G. S. R. Co. *v.* Mount Vernon Co., next case, and note, 662-665.

ALABAMA GREAT SOUTHERN R. CO.

v.

MOUNT VERNON CO.

(*Alabama Supreme Court, May* 23, 1888.)

Carriers of Goods—Contract—Connecting Lines—Liability for Loss.—A railroad company which receives cotton to be delivered at a place beyond its own line of transportation, without expressly limiting its liability, is regarded as having contracted for safe delivery at the point of destination, and as having made arrangements with other carriers for that purpose; and its connecting carriers have no contract with plaintiff, and are not liable to him.

Same—Delivery to Connecting Lines—Custom.—The fact that a railroad company receiving cotton for shipment put the car upon the side track of defendant railroad company, according to the custom existing between the two companies and an agreement for the shipment of freight over each other's road, and that defendant's agent reported the car to the car accountant, does not raise a presumption that defendant accepted the car as a carrier where it is not shown that it had received any shipping directions from the other company, or that it knew the consignee or the destination of the car.

Same—Bill of Lading—Ownership of Goods.—Where a bill of lading requires freight to be delivered to the order of the consignor, the deposit in the post of the bill of lading, unindorsed, attached to a draft drawn upon a third person for the purchase-price of the freight, and directed to such third person, does not necessarily raise a conclusive presumption that such third person was thereby vested with the title to the freight; but it may be shown that it was vendor's intention to retain the title in himself until after the acceptance or payment of the draft.

Same—Bill of Lading in Duplicates—Loss—Proof of Contents.—Where a bill of lading has been executed in duplicate, parol proof of its contents is incompetent until after satisfactory excuse for the non-production of both parts of the instrument itself. Hence, where a duplicate part of a bill of lading was attached to a draft drawn on plaintiff, and paid by him, there was a presumption that it was in his possession or under his control. And although loss of the other duplicate was proved, plaintiff could not prove its contents by parol until after excusing the non-production of the part

attached to the draft; and the fact that his residence was outside of the jurisdiction of the court made no difference.

APPEAL from a judgment in favor of plaintiff, in an action to recover damages for the destruction of cotton by fire while in the hands of defendant for transportation. The second charge, referred to in the opinion, is as follows: "(2) The court charges the jury that, if they believe from the evidence that the East Alabama R. Co. placed the car containing the cotton on the side track of the Alabama Great Southern R. Co. at the usual place of putting cars loaded with freight to be transported by the Alabama Great Southern R. Co.; that the local agent of the A. G. S. R. Co. checked said car, and reported the same to the car accountant of the defendant as a loaded car received from the East Alabama R. Co.; and that by this act the car was placed under the control of the defendant, and said local agent did this, and saw the car loaded with cotton before it was burned,—then, in such case, this was an actual delivery of the cotton to the defendant, whether there was any custom between the defendant and the East Alabama R. Co. to receive cotton in any other manner, or not."

Samuel F. Rice and *F. A. Dobbs* for appellant.

W. H. Denson for appellee.

CLOPTON, J.—When an instrument is executed in duplicate, proof of the loss or destruction, or a satisfactory excuse for the non-production, of both parts is essential to let in parol evidence of the contents. 1 Greenl. Ev. § 558. The bill of lading under which the cotton in controversy was shipped was executed in duplicate. One part was attached to the draft drawn by the shippers on the plaintiff for the purchase-money of the cotton, and was forwarded with it; the other was delivered to the attorney of the plaintiff about the time this suit was commenced. The draft having been paid, the presumption is that the bill of lading attached to it is in the possession or under the control of the plaintiff. While the proof was sufficient to show that the duplicate in the possession of the attorney had been lost or mislaid, there was no effort to account for the absence of the other part forwarded with the draft. The fact that the plaintiff resides beyond the jurisdiction of the court is no excuse for its non-production when having custody thereof. In the absence of the requisite preliminary proof, secondary evidence of the contents should not have been admitted.

Bill of lading —Parol evidence of contents.

Appellee sues appellant to recover damages for the failure to deliver 30 bales of cotton, which the complaint avers were received by the defendant as a common carrier to be delivered to plaintiff at Mount Vernon Switch, Md.

Facts.

In legal effect, the complaint alleges a contract between plaintiff and defendant to transport and deliver cotton to plaintiff at the designated point of destination. The undisputed evidence shows that the cotton was received by the East Alabama R. Co. under a contract of shipment from Gadsden, Ala., to Mount Vernon Switch, the delivery of which at the point of destination necessitated transportation over connecting lines, the road of the defendant being the next intermediate line, each line receiving its proportion of the freight charged for the transportation of the cotton. On the evidence, the East Alabama R. Co., having received the cotton to be delivered at a place beyond its own line of transportation, without expressly limiting its liability, is regarded as having contracted for safe delivery at the point of destination, and as having made arrangements with other carriers for this purpose. Railroad Co. *v.* Copeland, 63 Ala. 219. Such being the case, the obligation of the defendant was to safely transport the cotton to the terminus of its road and deliver it to the next connecting line. There was no contract between the plaintiff and defendant to deliver the cotton at Mount Vernon Switch. The variance between the contract averred in the complaint and the contract as proved disentitles the plaintiff to recover on the complaint as framed. Railway Co. *v.* Culver, 75 Ala. 587.

East Alabama road contracted to carry to destination.

Notwithstanding the judgment must be reversed for the reasons above stated, a decision of other questions presented by the record will probably serve to prevent the unnecessary embarrassment or protraction of this litigation. The cotton was carried from Gadsden to Attalla, December 22, 1884, where the car containing it was switched off on a side track connected with the road of defendant, and was destroyed by fire the third day thereafter. There was evidence tending to show that it had been the custom of the East Alabama R. Co. to transport loaded cars from Gadsden to Attalla and switch them off on defendant's side track for transportation over defendant's road, before any bills of lading were issued and shipping directions given, without objection on the part of defendant's agents; and the way-bill was afterwards furnished. As to the existence of such a custom, the evidence was in conflict. There was evidence on the part of defendant tending to show that the East Alabama R. Co., having no side track of its own, was permitted to switch off on the side tracks of defendant their loaded cars for Attalla, and for further transportation, as well as their empty cars, but that defendant did not receive them, and took no control over them, until furnished with way-bills or shipping directions. There was also evidence that the agent at

What constituted delivery of cotton to defendant.

Attalla was required to report to the car accountant department of defendant the number of each car, with the brand thereof, whether loaded or empty, that passed over the road daily or were left on side tracks, and that, in performance of this duty, he noted the number or brand of the car containing the cotton, and reported it in his daily car report as loaded. On this state of the evidence, the court substantially instructed the jury that, if the agent of the defendant had been in the habit, and it had been his custom for several years, to receive from the East Alabama R. Co. cotton and other freights to be transported by defendant to points beyond Attalla, on its side tracks, without other notice than placing the car on such track, and the East Alabama R. Co. did so place the cotton on the side track, and the agent of defendant at Attalla, before the cotton was burned, checked the car containing it, and reported the same to the car accountant of defendant as a loaded car received from the East Alabama R. Co., this was a delivery of the cotton to the defendant; and if, while it was so in the possession of defendant, to be transported over its road, the cotton was destroyed, the defendant is liable in this case unless it shows the loss was caused by some act which exempts the defendant from liability.

The first proposition of the charge is that the custom of placing the car on the side track, and it having been so placed and checked as hypothetically stated, constitute a delivery sufficient to charge the defendant with the duties and responsibilities of a common carrier in respect to the cotton. It may be remarked that the charge is partly abstract, there being no evidence that the agent of the company reported the car to the car department as a loaded car received from the East Alabama R. Co. The evidence in reference to this matter only shows that the agent reported the car, as his duty required, to give the car department information what cars of defendant passed Attalla, or were there, and whether loaded or empty. The general rule, that, to complete a delivery, the goods must be placed in the custody of the carrier or his agents so as to devolve on him the exclusive duty of safe-keeping, is subject to be varied by usage, or a particular course of dealing between the parties. If it was the usage of the defendant to receive loaded cars from the East Alabama R. Co. for immediate transportation at any particular place, this is tantamount to the acceptance of the freight, without further notice, when delivered at such place. But if loaded cars were switched off on a side track of defendant, there to remain until shipping directions were given, the defendant does not become a common carrier in respect to such freight until the shipping directions are furnished. "The delivery must be to the carrier or his agent, for immediate transportation; for, if the goods be delivered to him, to be stored by him for a certain

time or until something further is done or until further orders are received from the owner, the carrier becomes a mere depositary or bailee until the appointed time has expired or the other contingency happened upon which the carriage is to commence or until further orders have been given, as the case may be." Hutch. Carr. § 88. Conceding the custom as shown by plaintiff's witnesses, the question remains, What is its extent and scope, and in what capacity did the defendant receive the cotton—by its terms, express or implied? When a usage or custom is in derogation of the common law, nothing will be presumed to be within its terms which is not clearly implied. Bank *v.* McDonnell, 4 So. Rep. 346. Assuming the custom to be as stated in the charge, it cannot be clearly implied that the defendant received the loaded cars, though placed on one of its side tracks, for transportation as a common carrier before a way-bill or shipping directions were given. It should not be presumed that the defendant assumed the high responsibilities of a carrier and the duty of immediate transportation without knowing to whom and to what place to ship the cotton. Giving the usage its fullest scope, the defendant became a depositary or bailee of loaded cars, placed on its side track, until further orders or directions were given.

Bill of lading —Ownership of goods.

The charge is erroneous in another respect. Whether a transaction is a sale, so as to pass the property, or a sale on condition, or an executory contract of sale, is generally regarded as a question of intention to be collected from the terms of the agreement and the attendant circumstances. Where the parties reside at a distance from each other, and the goods are to be transported by a common carrier, the bill of lading represents the property. If the goods, in pursuance of an order, are delivered to the carrier for delivery to the buyer, this is *prima facie* a constructive delivery to the vendee, and presumptively passes the property. But if, by the bill of lading, the goods are to be delivered to the order of the vendor, it clearly operates, in the absence of rebutting evidence, to retain the title in the vendor, and indicates an intention that the property shall not pass. McCormick *v.* Joseph, 77 Ala. 236. The evidence is conflicting as to whom the cotton was to be delivered to at Mt. Vernon Switch. Coughland testifies that the cotton was purchased by him for and on account of Smith & Coughland, and that by the bill of lading it was to be delivered to their order at the point of destination. If this be true, they retained the *jus disponendi.* It is insisted, however, that the deposit in the post-office of the bill of lading attached to the draft, which was drawn by the vendors for the purchase-money, directed to the plaintiff, is delivery of the cotton to the vendee. Such would be the presumption if the bill of lading

was properly indorsed, of which there is no evidence. But this presumption may be rebutted by proof of an intention that the property should not pass until the draft was accepted, or paid, as the case may be. It does not follow from the mere deposit in the post-office of the bill of lading, unindorsed, attached to the draft, as a conclusion of law, that the property passed to the plaintiff. The payment of the draft subsequent to the burning of the cotton would not operate to vest in plaintiff the property at the time of its destruction, if it had not previously passed. The charge ignores the question of ownership, which it is incumbent on plaintiff to establish, and withdraws from the consideration of the jury the evidence tending to show that the property in the cotton had not passed to plaintiff at the time it was burned. It results that the second charge given at the request of the plaintiff is also erroneous. Reversed and remanded.

What Amounts to Contract to Carry to Destination.—See Rickerson R. M. Co. *v.* Grand Rapids & I. R. Co., 32 Am. & Eng. R. R. Cas. 487, note 496; Cummins *v.* Dayton, note, 9 Am. & Eng. R. R. Cas. 39.

Carriers—Connecting Lines—Liability for Loss of Goods.—In the case of McMillan *v.* Grand Trunk R. Co., 15 Ont. App. Rep. 14,—an action to recover damages for the loss of goods consigned to be carried by the defendants from Toronto to McGregor station, on the C. P. Railway in Manitoba, and for injury sustained by other goods from water and for delay in transport; the line of the defendants' road extended as far as Fort Gratiot, Michigan, and the goods were carried the rest of the way by other companies, and were damaged by the negligence of one or more of such companies,—the defendants sought to protect themselves from liability by setting up the 10th condition indorsed on the receipt given to the plaintiff for the amount paid by him for carriage, which was as follows: "Goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no directions to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Grand Trunk R. Co, shall not be responsible for any loss, misdelivery, damage, or detention occurring after the said goods arrive at said stations, or places on their line nearest to the points or places which they are consigned to, or beyond their said limits." *Held*, that the contract of the defendants was to carry the goods to McGregor station; and in its true construction, the 10th condition applied only to the forwarding of the goods from the place to which the defendants had contracted to carry them, whether that was a place on the line of the defendants' or a connecting railway, and had not the effect of limiting the liability of the defendants to matters occurring on their own line only, following Collins *v.* Bristol

& Exeter R. W. Co., 7 H. L. Cases, 194. *Held*, also, that the provisions of the Railway Act, R. S. C. ch. 109, sec. 104, which preclude a railway company from relieving themselves from liability by any notice, condition, or declaration, if the damage arises from any negligence, omission, or misconduct of the company or its servants, do not apply to a contract to carry goods over other lines, even though such are within the territorial jurisdiction of the parliament of Canada.

Same—Responsibility of Carriers for Negligence on Connecting Lines.—In the absence of a special contract, the various companies over which goods pass *en route* to their destination are bound to safely carry and safely deliver the goods to the next succeeding carrier. St. Louis, I. M. & S. R. Co. *v.* Weakly (Ark.), 8 S. W. Rep. 134; Converse *v.* Norwich & N. Y. Transp. Co., 33 Conn. 177; Hood *v.* New York & N. H. R. Co., 22 Conn. 1; Central R. Co. *v.* Avant (Ga.), 5 S. E. Rep. 78; Express Co. *v.* Rush, 24 Ind. 403; Atchison, T. & S. F. R. Co. *v.* Roach, 35 Kan. 740; Berg *v.* Atchison, T. & S. F. R. Co., 30 Kan. 561; Grindle *v.* Eastern Express Co., 67 Me. 317; s. c., 24 Am. Rep. 31; Skinner *v.* Hall, 60 Me. 477; Perkins *v.* Portland S. & P. R. Co., 47 Me. 573; Burroughs *v.* Norwich & W. R. Co., 100 Mass. 26; s. c., 1 Am. Rep. 78; Darling *v.* Boston & W. R. Co., 93 Mass. (11 Allen) 295; Nutting *v.* Connecticut River R. Co., 67 Mass. (1 Gray) 502; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168; McMillan *v.* Michigan S. R. Co., 16 Mich. 79; Ortt *v.* Minneapolis & St. L. R. Co., 36 Minn. 396; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390; s. c., 2 Am. Rep. 130; Crawford *v.* Southern R. Co., 51 Miss. 222; s. c., 24 Am. Rep. 626; Grover & B. S. M. Co. *v.* Missouri Pac. R. Co., 70 Mo. 672; s. c., 35 Am. Rep. 444; Coates *v.* United States Ex. Co., 45 Mo. 238; Hoagland *v.* Railroad Co., 39 Mo. 451; Gray *v.* Jackson, 51 N. H. 9; s. c., 12 Am. Rep. 1; Babcock *v.* Lake Shore & M. S. R. Co., 49 N. Y. 491; Reed *v.* United States Express Co., 48 N. Y. 462; s. c., 8 Am. Rep. 561; Root *v.* Gt. W. R. Co., 45 N. Y. 524; Rawson *v.* Holland, 5 Daly (N. Y.), 15; aff'd, 59 N. Y. 611; Knott *v.* Raleigh & G. R. Co., 98 N. C. 73; American Express Co. *v.* Second Nat. Bank, 69 Pa. St. 394; s. c., 8 Am. Rep. 268; Railroad Co. *v.* Berry, 68 Pa. St. 272; Mullaskey *v.* Philadelphia, etc., R. Co., 9 Phila. (Pa.) 114; Harris *v.* Grand Trunk R. Co. (R. I.), 5 Atl. Rep. 305; Carter *v.* Peak, 4 Sneed (Tenn.), 203; Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665; Bank *v.* Transp. Co., 23 Vt. 209; Michigan Cent. R. Co. *v.* Myrick, 107 U. S. (17 Otto) 102; bk. 27, L. ed. 325; Ogdensburg & L. C. R. Co. *v.* Pratt, 89 U. S. (22 Wall.) 123; bk. 22, L. ed. 827; Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 83 U. S. (16 Wall.) 318; bk. 21, L. ed. 297; Stewart *v.* Terre Haute & I. R. Co., 3 Fed. Rep. 768; Jennison *v.* Camden & A. R. Co., 4 Am. L. Reg. 234. And it is said in Atchison, T. & S. F. Co. *v.* Roach, 35 Kan. 740, that each carrier is liable for the result of its own negligence, and that although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, yet any of the subsequent or connecting carriers to whose default it can be traced, will be liable to the owner for the loss or damage to the goods transported. See Aigen *v.* Boston & M. R. Co., 132 Mass. 423; Railroad Co. *v.* Weaver, 9 Lea (Tenn.), 39. According to the English doctrine, the receipt of goods by a carrier directed to a point beyond his line creates a *prima facie* contract to transport them safely to their destination. Scotthroon *v.* South Staffordshire R. Co., 18 Exch. 341; s. c., 18 Eng. C. L. & Eq. 553; Bristol & Exeter R. Co. *v.* Collins, 7 H. L. Cas. 194; Coxon *v.* Great W. R. Co., 5 H. & N. 274; Directors of B. & F. R. Co. *v.* Collins, 5 Hurls. & N. 969; Muscamp *v.* Lancaster & P. J. R. Co., 8 Mees. & W. 424. And in this country there are some cases in which carriers who have received goods marked for places beyond their lines have been held liable for their safe delivery at their destination, generally upon an implied

contract to deliver them as marked. Mobile & G. R. Co. *v.* Copeland, 63 Ala. 219; s. c., 35 Am. Rep. 13; Bennett *v.* Filyon, 1 Fla. 403; Southern Express Co. *v.* Shea, 38 Ga. 519; Mosher *v.* Southern Express Co., 38 Ga. 37; Erie R. Co. *v.* Wilcox, 84 Ill. 239; s. c., 25 Am. Rep. 451; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88; s. c., 5 Am. Rep. 92; Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332; Mulligan *v.* Illinois Cent. R. Co., 36 Iowa, 181; s. c., 14 Am. Rep. 514; Angle *v.* Mississippi & M. R. Co., 9 Iowa, 487; Teal *v.* Sears, 9 Barb. (N. Y.) 317; Wilcox *v.* Parmelee, 3 Sandf. (N. Y.) 610; Kyle *v.* Laurens R. Co., 10 Rich. (S. C.) L. 282; Noyes *v.* Rutland & B. R. Co., 27 Vt. 110; East Tennessee & Va. R. Co. *v.* Rogers, 6 Heisk. (Tenn.) 143; s. c., 19 Am. Rep. 589.

It is said in the case of Wabash, St. L. & P. R. Co. *v.* Jaggerman, 115 Ill. 407, that it is the well-settled doctrine in Illinois that where a common carrier receives goods to carry, marked to a particular place beyond his line, he is bound, under an implied agreement from the marks and directions, to carry to and deliver at that place, although it be a place beyond his own line of carriage. See Erie R. Co. *v.* Wilcox, 84 Ill. 239; Chicago & N. W. R. Co. *v.* Montfort, 60 Ill. 175; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88; Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389; Railroad Co. *v.* Copeland, 24 Ill. 332. But the carrier may stipulate in a bill of lading that its liability shall cease upon delivery to the consignee or carrier over whose connecting line the freight is to be shipped. T. & P. R. Co. *v.* Rogers (Tenn.), 3 S. W. Rep. 660. See Wabash & St. L. & P. R. Co. *v.* Jaggerman, 115 Ill. 407. But it is said in Alabama G. S. R. Co. *v.* Thomas (Ala.), 3 So. Rep. 802, that a railroad company receiving cattle for transportation as a common carrier cannot limit its liability to injuries caused by gross or wanton negligence, nor to that of a mere agent or consignee in the matter of delivering the cattle to such connecting road, such stipulation being contrary to public policy. See Insurance Co. *v.* Allen, 80 Ala. 571; Insurance Co. *v.* Young, 59 Ala. 476; Steele *v.* Townsend, 37 Ala. 247. It has also been said that where a contract for transportation of goods is made between a railroad company for itself, the warehouseman who is to receive the goods and deliver them to the connecting carrier, and the connecting carrier, on the one part, and the shipper, who has no knowledge of the tripartite agreement on the other, the railroad company is not the agent of the shipper, and has no power to make a contract with the warehouseman that would relieve him from responsibility for its negligence, resulting in loss of the goods by fire, or to bind the shipper by any contributory negligence from which the railroad company might be guilty in delivering in an unsafe position in the warehouseman's yard. Merchants' Wharf-boat Assoc. *v.* Wood, 64 Miss. 661.

Same—Defective Cars.—It is said in Wallingford *v.* Columbia & G. R. Co., 26 S. C. 258, that in an action against a railroad company for injury to stock shipped in a defective car, it is no defence that the car belonged to another company, a connecting carrier.

Same—Wrongful Delivery by Connecting Line.—In North *v.* Merchants' & M. Transp. Co., 146 Mass. 315, the defendant, a transportation company, contracted to transport plaintiff's goods from Boston to Norfolk, Virginia, there to be delivered to him or his assigns. The bill of lading showed that the goods were to be sent to Windsor, North Carolina, and contained the words "Notify A. B., Windsor, N. C." The defendant, which was its custom with goods marked for points beyond its line, as these were, undertook to deliver them to connecting carriers, and the connecting carriers delivered them to A. B. at Windsor, without requiring him to produce the order from plaintiff. The court held that upon A. B.'s refusal to pay for the goods the defendant was liable for a breach of duty,

and that the facts and the value of the goods being undisputed, it was proper for the court to charge that the plaintiff was entitled to a verdict as a matter of law.

Same—Agreement as to Liability.—Two or more corporations owning continuous lines may become joint carriers,—Swift *v.* Pacific Mail S. S. Co., 106 N. Y. 206;—and each carrier may agree that its liability shall extend over the entire route. See Atchison, T. & S. F. R. Co. *v.* Roach, 35 Kan. 740; Berg *v.* Atchison, T. & S. F. R. Co., 30 Kan. 561; Michigan Cent. R. Co. *v.* Myrick, 107 U. S. (17 Otto) 102; bk. 27, L. ed. 325; Stewart *v.* Terre Haute & I. R. Co., 3 Fed. Rep. 768,—or may stipulate that it shall not be liable beyond the terminus of its own line. Atchison, T. & S. F. R. Co. *v.* Roach, 35 Kan. 740; Berg *v.* Atchison, T. & S. F. R. Co., 30 Kan. 561.

A carrier of goods may contract to be liable beyond its own line, and such liability may be implied from circumstances without an express contract. Barter *v.* Wheeler, 49 N. H. 9; s. c., 6 Am. Rep. 434; Nashua Lock Co. *v.* Worcester & N. R. Co., 48 N. H. 339; s. c., 2 Am. Rep. 242; Cutts *v.* Brainard, 42 Vt. 566; s. c., 1 Am. Rep. 353; Morse *v.* Vermont, etc., R. Co., 41 Vt. 55. However, an agreement to extend its liability beyond its own line will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Michigan Cent. R. Co. *v.* Myrick, 107 U. S. (17 Otto) 102; bk. 27, L. ed. 325. It is said that such a contract is not implied by the fact that a notice of the charges for other transportations was posted in the depot of the first carrier,—Michigan Cent. R. Co. *v.* Myrick, 107 U. S. (17 Otto) 102; bk. 27, L. ed. 325;—nor by the mere fact that the carrier receives goods marked to a place beyond the terminus of its own line, and names a route for the same. Detroit & Bay City R. Co. *v.* McKenzie, 43 Mich. 609; Ortt *v.* Minneapolis & St. L. R. Co., 36 Minn. 390; Harris *v.* Grand Trunk R. Co. (R. I.), 5 Atl. Rep. 305; Stewart *v.* Terre Haute & I. R. Co., 3 Fed. Rep. 768. See Converse *v.* Norwich & N. Y. Transp. Co., 33 Conn. 179; Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468; Elmore *v.* Naugatuck R. Co., 23 Conn. 457; Hood *v.* New York & N. H. R. Co., 22 Conn. 1; Pittsburg, C. & St. L. R. Co. *v.* Martin, 61 Ind. 539; Angle *v.* Mississippi R. Co., 9 Iowa, 493; Grindle *v.* Eastern Corp., 67 Me. 317; Perkins *v.* Portland S. & P. R. Co., 47 Me. 573; Darling *v.* Boston & W. R. Corp., 93 Mass. (11 Allen) 295; Lowenburg *v.* Jones, 56 Miss. 688; Crawford *v.* Southern R. Assoc., 51 Miss. 222; Gray *v.* Jackson, 51 N. H. 9; Reed *v.* United States, 48 N. Y. 462; American Express Co. *v.* Second Nat. Bank, 69 Pa. St. 394; Knight *v.* Providence & W. R. Co., 13 R. I. 576; Brintnall *v.* Saratoga & W. R. Co., 32 Vt. 665. The contrary, however, has been held in some cases where a carrier received goods which were marked beyond its own line, and there was no contract exempting from liability. See Mobile & G. R. Co. *v.* Copeland, 63 Ala. 219; Hot Springs R. Co. *v.* Trippe, 42 Ark. 465; Southern Express Co. *v.* Shea, 38 Ga. 519; Mosher *v.* Southern Express Co., 38 Ga. 37; Wabash, St. L. & P. R. Co. *v.* Jaggerman, 115 Ill. 407; Foy *v.* Troy & B. R. Co., 24 Barb. (N. Y.) 382.

ISSOURI PACIFIC R. CO.

v.

FAGAN *et al.*

(*Texas Supreme Court, Nov.* 27, 1888.)

Carrier—Condition of Shipment—Waiver.—A common carrier has no right to demand of a shipper a waiver of his right as a condition precedent to receiving freight.

Same—Live-stock—Stipulation as to Damages for Loss.—A carrier has no right to require, as a condition precedent to receiving live-stock for transportation, an agreement by the shipper that, in case of total loss of the live-stock, the measure of damages shall not exceed its cash value at the place of shipment.

Same—Caring for Stock—Unreasonable Regulation.—A requirement by a railroad company that the shipper of live-stock shall accompany such stock and provide for it at his own risk and expense, as a condition to receiving such stock as freight, is unreasonable; and defendant in an action for the loss of such stock cannot prove such custom, in order to avoid liability for failure to so provide and care for the stock.

Same—Custom—Evidence of.—Evidence to prove a custom among railroads not to receive live-stock unless the shipper agrees to hold the railroad harmless for all original delays in taking up freight is incompetent, as such a custom would not be necessary, if the law held the railroad harmless for such delays, and it could not prevail over the law if the latter did not hold the railroad harmless.

Same—Loss—Notice of Claims—When Regulation Unreasonable.—Where live-stock, for injury to which damages are claimed from the railroad company who transported it, was shipped from a point at which the company had no agent, it is incompetent for defendant to show a custom among railroad companies to require the shipper of live-stock to agree, as a condition precedent to his right of recovery for loss or damage to the stock during shipment or transportation, that he will immediately and before removal of the stock from the point of shipment, or from the possession of the company at its destination, as the case may be, give notice of his claim to an agent or officer of the road, for it is not reasonable to require such a notice where the company has no agent at the point of shipment, upon whom such a notice can be served.

Same—Loss—Measure of Damages.—Where it is shown that the large part of a cargo of horses consists of mares with foal, there is an inherent defect in such freight, and the correct measure of damages for total loss is the price, less the freight charges, which they would have brought at the place of destinatian in the condition which they would have been in had the company exercised due and necessary care while they were in its possession.

Same—Evidence.—Where plaintiff's evidence showed a contract of shipment to have been in writing, an objection to questions asked him on cross-examination as to an agreement by him to feed and provide for the live-stock shipped, was properly sustained.

APPEAL from a judgment in favor of plaintiffs, in an action for

damages for injury to live-stock, shipped by plaintiffs over defendant's railroad. The opinion states the case.

J. D. Guinn for appellant.

Cooke, Denman & Franklin for appellees.

COLLARD, J.—This suit was brought by appellees, plaintiffs below, against appellant, defendant below, for injuries to and loss of two carloads of horses shipped by plaintiff on defendant's railroad, September 21, 1885, from San Antonio, Tex., to Memphis, Tenn. The cause was tried by the judge both on the law and the facts, and judgment rendered for plaintiff for $1800. Defendant appealed. The error assigned by appellant upon the ruling of the court in refusing defendant's application for a continuance need not be considered, as the case will be reversed on other grounds, and as there is no new feature of the law of continuances presented in the application. The action of the court in overruling defendant's general demurrer to the petition is assigned as error. No error is pointed out in the assignment, and upon inspection of the petition we fail to discover any that would require a revision of the court's ruling. The court permitted Fagan to testify, over defendant's objections, that the conductor of the train on which the horses were shipped informed him at what time the train was due at Palestine from San Antonio. Defendant duly excepted, and assigned the ruling as error, because the statement of the conductor was not the best evidence. It is sufficient for us simply to say that there was no error in the ruling.

Case stated.

Evidence—Statement of conductor.

It is claimed by appellant that the court erred in permitting witness Fagan to state what the custom of the railroad was in delivering stock at their destination. It seems the object of the testimony was to show that Jones & Co. held the horses for the railroad company, and that plaintiff was thus relieved of the care of them while they were in Memphis. The testimony objected to was as follows: Fagan testified that "it was customary for railroad companies to turn over stock at shipping stations, and at destination of stock, just as his were turned over to J. C. Jones & Co., at Memphis." This evidence was introduced in connection with other statements of Fagan, while on the stand, that the horses were not turned over to him on arrival at Memphis; that Jones & Co. took possession of them, and put them in the stock-yards; and that Jones told him he held them for the railroad for freight charges. The question of fact was, were the horses delivered to Fagan at Memphis? The custom of railroads was invoked to aid plaintiff's direct proof upon this subject. The question of custom does not seem to be of more

Custom as to delivering stock at destination—Evidence.

than incidental importance in this case. The object of the evidence was not to establish any obligation on the part of the company by proof of a custom, or to show that it was a duty of the carrier, fixed by usage in the course of business, to hold the horses at the place of destination, upon which plaintiff seeks to recover in this action; but the object was to show that because of such usage the stock was not in fact delivered. The fact of delivery or not was susceptible of positive proof, and there was positive proof upon the question. It seems hardly probable that the company would deliver the horses until the freight had been paid, and it is not claimed that they did. However, we may say that to warrant the introduction of usage or custom in the course of trade it is necessary to show that it is uniform, reasonable, and notorious, and the custom must be established by a witness or witnesses who are experienced in such transactions, and who can testify to the facts constituting the custom. Opinions are not sufficient, nor are reports or reputation. 2 Greenl. Ev. §§ 251, 252; 2 Redf. R. R. § 184. The evidence objected to does not come up to the required standard, so the assignment of error must be sustained. Appellant says the court erred in "permitting Fagan to give his opinion as to what the stock would have been worth at Memphis if they had not been injured in transportation." Knowledge of the market value of an article is hardly an opinion. It is a fact known from information. If a witness is not fully qualified to state the fact, a cross-examination will show it. Such matters go to the weight of the evidence and the credibility of the witnesses, and not to the competency of the testimony. The question here raised as to the correct measure of damages will be noticed hereafter.

Opinion evidence as to value of stock.

The seventh and ninth assignments of error are to the same effect, and are based on the refusal of the court to allow defendant to prove by the witness Michelson that the universal custom of all railroads, and particularly that of defendant, had been at all times, and still was, not to ship live-stock, or receive the same for shipment, of any kind whatever—First. Unless the owner or agent would accompany the stock, on the same train, and at his, the shipper's, expense and risk, feed and water such stock at the points where it is unloaded for the purpose. Second. Unless the shipper would hold the railway harmless against ordinary delays in taking up freight. Third. Unless the shipper expressly agrees that, as a condition precedent to his right to any damage for any loss or injury to his stock during transportation, or previous to loading for shipment, such shipper will give notice, verified by affidavit, of his claim therefor to some general officer of the railroad company, or to the nearest station agent, before

Custom of railroads as to carriage of live stock.

the stock is removed from the point of shipment or destination, and before the stock is mingled with other stock. Fourth. Unless the shipper agrees that, in case of total loss of stock, not more than the actual cash value of the same at the place of shipment shall be the measure of damage. Fifth. Without furnishing the shipper a free pass over the line of shipment, along with the same train, to the place of destination of the stock. Defendant offered to show that such customs were general, and known to plaintiff, as well as to all shippers of live stock over railroads, and specially on defendant's railroad. The objection made to the evidence was that it would limit the liability of the carrier. It was not objected that these stipulations were set up in the answer as existing in contract between the parties, nor that the proof showed, as it did, that there was a contract containing all the agreements of the parties. Usages of trade, Mr. Greenleaf says, should be sparingly adopted by the courts as rules of law. "Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts arising, not from express stipulation, but from mere implications and presumptions and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expressions of doubtful or various senses." 2 Greenl. Ev. § 251. Usages of trade are admissible, however, to show the relative duties and rights of parties as incidents of contracts and transactions; but the usage sought to be invoked must have all the elements of a usage as to certainty, uniformity, notoriety, and reasonableness, and it must not be contrary to law. A usage cannot be a good usage if it is contrary to law or public policy. In the case before us, for example, the defendant offered to show a custom of railroads not to receive for transportation any live-stock unless under certain conditions, modifying their common-law liability. Such a custom would be bad, because railroads cannot legally refuse to ship live-stock.

Evidence of custom not admissible.

A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. If such a custom should be ever so common and uniform, it could not be sustained, because it, the custom, would be against law. Let us look at the particulars of the custom proposed in this case. It required the owner to go along on the same train with his stock, to feed and water them at his own risk and expense. The law imposes this duty on the carrier, and the carrier cannot transfer it to the shipper by custom. The shipper might agree to go with his stock, and to feed and water them at his own expense, but he could not be compelled to do so by custom, because the law requires this duty of the carrier. This custom

Custom examined and held invalid.

also required that the owner of the stock would hold the railroad harmless against ordinary delays in taking up freight. If the law held the railroad harmless for such delays, a custom would not be necessary. If the law held it liable, a custom could not repeal or suspend the law. It was also required by the custom proposed that the shipper should expressly agree that, as condition precedent to his right to any damages for any loss or injury to his stock during transportation, he should give notice of his claim therefore, verified by his affidavit, to some general officer of the railroad, or the nearest station agent, before the stock was removed from the point of shipment or destination. If the shipper should make a contract to give such notice, it might be binding, under our law, if it was shown that there was such officer or agent at the point of destination upon whom the notice could be conveniently served. The custom in this case did not propose to show that there was such officer or agent at the point of shipment or destination, without which it would be an unreasonable custom. It would be an unreasonable stipulation in a contract limiting the carrier's liability, and as an express contract for that reason it could not be enforced. Railroad Co. *v.* Harris, 67 Tex. 166, 2 S. W. Rep. 574. But we will not be understood to hold that the custom, if it had been shown to be reasonable, could be sustained. A custom cannot require that a shipper shall expressly agree to a limitation of his right to damages. The law of the land regulates such matters, and fixes liability upon failure to perform duties and obligations of carriers; and when so fixed, a custom cannot extinguish it, or require the injured party to limit it by agreement. We may say the same of the stipulation in the proposed custom requiring the shipper to agree, as a condition to ship his stock on a railroad, that, in case of total loss of stock, the measure of damages should not be more than the cash value of the same at the place of shipment. Such a custom would be illegal, and the carrier could not require that the shipper should make such a special contract. See Railroad Co. *v.* Trawick, 68 Tex. 314, 4 S. W. Rep. 567, in addition to other authorities cited.

Fagan's testimony—Feeding and watering stock.

Appellant claims that the court erred in sustaining plaintiff's objection to testimony of Fagan, sought to be elicited by defendant while he was being cross-examined, that his agreement was to feed and water the stock and attend them at his own expense. It is sufficient to say, in answer to this assignment, that the evidence of Fagan showed that the contract of shipment was in writing. The objection to the evidence was that it was not the best evidence. The objection was well taken, and was properly sustained.

But one other assignment of error need be noticed, as it will

dispose of the rest, which relate to the same subject more or less definitely. The court found as a conclusion of law that the measure of damages was the difference between the market value of the stock in the condition they arrived at destination, and their market value had they arrived in good order and condition. This rule for the measure of damages is assigned as error. We agree with the appellant upon this subject. The court found, and the evidence showed that many of the mares shipped were with foal, and that they lost their foal on the way, and when they arrived at Memphis they were practically worthless. The most of the cargo were mares. The railway company were bound to deliver them in a reasonable time, and it was bound to exercise reasonable care of the animals while in its possession and while in course of transportation. The correct measure of damages for total loss, there being what is called an inherent defect in such freight, and especially so in mares with foal, would be the price, less the freight charges, they would have brought in the market at the place of destination in the condition they would have been in had the company exercised due and necessary care of the same while in its possession, and this price, less freight charges, at the time they should have arrived if shipped and delivered in a reasonable time. In case of partial loss the measure of damages would be the difference in such price, less freight above stated, and the value of the animals at the same place at the time of arrival. Railway Co. *v.* Harris, *supra*. The company would not be liable for damages resulting from inherent vices and defects in animals. So if the defendant company performed all its obligations and duties as a public carrier in transporting the animals, and loss or depreciation of price resulted from natural defects, no damages could be had. The principle is, the company would be liable for no injury arising from such defects, and the defects must be considered in estimating damages if any arise. The judgment of the court below should be reversed, and remanded for a new trial.

Measure of damages.

STAYTON, C.J.—Report of the commissioners of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

Carriers of Live-stock—Injuries—Damages.—In Houston & T. C. R. Co. *v.* Hester (Tex.), 7 S. W. Rep. 776, the injuries to cattle in shipping resulted partly from the acts of the owners in overcrowding the cars, and partly from acts of the carrier. The jury, in the action against the carrier, having been instructed that plaintiffs were not entitled to recover for damages resulting from overcrowding, rendered a general verdict for plaintiffs in a sum not greater than the damages claimed as resulting from acts of the carrier. *Held*, that the jury must be presumed to have considered, in estimating damages, only such facts as, under the charge, would fix liability on the carrier.

Same—Contract of Carriage—Suit on.—In the case of Central R. & Banking Co. *v.* Tucker (Ga.), 4 S. E. Rep. 5, the contract declared upon being an undertaking to carry from Eufaula, Ala., and deliver at Albany Ga., and that proved being a special agreement to carry from Louisville, Ky., via Atlanta, to Quitman, Ga., the court held that the evidence did not support the declaration. The two contracts are different causes of action; and in a suit upon the one there can be no recovery on the other.

Same—Limiting Liability.—Common carriers may by contract limit their common-law liability when the limitation is one reasonable in character. Louisville & N. R. Co. *v.* Sherrod, 84 Ala. 178; Alabama & G. S. R. Co. *v.* Thomas, 83 Ala. 343; Rosenfeld *v.* Peoria, D. & E. R. Co., 103 Ind. 121; Sprague *v.* Missouri Pac. R. Co., 34 Kan. 347; Hutchinson *v.* Chicago, St. P. O. & N. R. Co., 37 Minn. 524; Moulton *v.* St. Paul M. &. M. R. Co., 31 Minn. 85; McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343; s. c., 4 S. W. Rep. 689; Platt *v.* Richmond, Y. R. & C. R. Co., 108 N. Y. 358; Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577; Grogan *v.* Adams Express Co., 114 Pa. St. 529; Marr *v.* Western Union Tel. Co., 85 Tenn. 529; Block *v.* Transportation Co. (Tenn.), 6 S. W. Rep. 881; Pacific Express Co. *v.* Darnell (Tex.), 6 S. W. Rep. 765, and note; Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166; Black *v.* Goodrich Transp. Co., 55 Wis. 319; Ayres *v.* Chicago & N. W. R. Co. 71 Wis. 372; Hart *v.* Pennsylvania R. Co., 112 U. S. 331; bk. 28, L. ed. 717; The Bermuda, 29 Fed. Rep. 399; s. c., 27 Fed. Rep. 476; The Surrey, 26 Fed. Rep. 791; The New Orleans, 26 Fed. Rep. 44; The Lydian Monarch, 23 Fed. Rep. 298; Rintoul *v.* New York Cent. & H. R. R. Co., 17 Fed. Rep. 905; May *v.* The Powhattan, 5 Fed. Rep. 375; Ormsby *v.* Union P. R. Co., 4 Fed. Rep. 706.

In Atwood *v.* Transportation Co., 9 Watts (Pa.), 87, Gibson, C.J., recognized the rule as well established, although expressing grave doubts of its wisdom.

In Laing *v.* Colder, 8 Pa. St. 479, this court gave its assent to the rule; while Bell, J., by whom the opinion was delivered, expressed his sympathy with the doubt of Chief Justice Gibson.

The same rule has held in many later cases, among which are Central R. & Banking Co. *v.* Smitha (Ala.), 4 So. Rep. 708; Alabama & G. S. R. Co. *v.* Thomas, 83 Ala. 343; Rosenfeld *v.* Peoria, D. & E. R Co., 103 Ind. 121; Clyde *v.* Hubbard, 88 Pa. St. 358; Pennsylvania R. Co. *v.* Miller, 87 Pa. St. 395; American Express Co. *v.* Sands, 55 Pa. St. 140; Powell *v.* Pennsylvania R. Co., 32 Pa. St. 414; T. & P. R. Co. *v.* Rogers (Tenn.), 3 S. W. Rep. 660; Pacific Express Co. *v.* Darnell (Tex.), 6 S. W. Rep. 765; Hart *v.* Pennsylvania R. Co., 112 U. S. 331; bk. 28, L. ed. 717.

But a common carrier cannot stipulate for exemption from the consequences of his own negligence or that of his servants. Rosenfeld *v.* Peoria, D. & E. R. Co., 103 Ind. 121; St. Louis & S. F. R. Co. *v.* Smuck, 49 Ind. 302; Ohio & M. R. Co. *v.* Selby, 47 Ind. 471; Adams Express Co. *v.* Fendrick, 38 Ind. 150; Michigan S. & N. I. R. Co. *v.* Heaton, 37 Ind. 448; Indianapolis P. & C. R. Co. *v.* Allen, 31 Ind. 394; Sprague *v.* Missouri Pac. R. Co., 34 Kan, 347; Moulton *v.* St. Paul, M. & M. R. Co., 31 Minn. 85; McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343; Pennsylvania R. Co. *v.* Miller, 87 Pa. St. 395; Grogan *v.* Adams Express Co., 114 Pa. St. 529; Missouri Pac. R. Co. *v.* Harris, 67 Tex, 166; Black *v.* Goodrich Transp. Co., 55 Wis. 319; Hart *v.* Pennsylvania R. Co., 112 U. S. 331; bk. 28, L. ed. 717; Grand Trunk R. Co. *v.* Stevens, 95 U. S. (5 Otto) 655; bk. 24., L. ed. 535; Bank of Kentucky *v.* Adams Express Co. 93 U. S. (3 Otto) 174; bk. 23, L. ed. 872; Ogdensburg & L. C. R. Co. *v.* Pratt, 89 U. S. (22 Wall.) 27; Southern Express Co. *v.* Caldwell, 88 U. S. (21 Wall.) 264; bk. 22, L. ed. 556; New York Cent. R. Co. *v.* Lockwood, 84 U. S. (17 Wall.) 357; bk.

21, L. ed. 627; York Mfg. Co. *v.* Merchants' Bank, 47 U. S. (6 How.) 344; bk. 12, L. ed. 465; The Surrey, 26 Fed. Rep. 791; The New Orleans, 26 Fed. Rep. 44; Rintoul *v.* New York Cent. & H. R. R. Co., 17 Fed. Rep. 905; May *v.* The Powhattan, 5 Fed. Rep. 375; Ormsby *v.* U. P. R. Co., 4 Fed. Rep. 706. See also following authorities:

In Alabama.—Grey *v.* Mobile Trade Co., 55 Ala. 387; South & N. A. R. Co. *v.* Hanlein, 52 Ala. 606; s. c., 56 Ala. 368; Southern Exp. Co. *v.* Armstead, 50 Ala. 350; Southern Exp. Co. *v.* Crook, 44 Ala. 468; Southern Exp. Co. *v.* Capertown, 44 Ala. 101; Mobile & O. R. Co. *v.* Jarboe, 41 Ala. 644; Mobile & O. R. Co. *v.* Hopkins, 41 Ala. 486; Steele *v.* Townsend, 37 Ala. 247; McClure *v.* Cox, 32 Ala. 617; Hibler *v.* McCartney, 31 Ala. 501; Cox *v.* Peterson, 30 Ala. 608; Wayland *v.* Mosely, 5 Ala. 430; Ezell *v.* English, 6 Port. (Ala.) 311; Ezell *v.* Miller, 6 Port. (Ala.) 307; Sampson *v.* Gazzam, 6 Port. (Ala.) 123; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135.

In Arkansas.—Taylor C. & Co. *v.* Little Rock, M. R. & T. R. Co., 32 Ark. 393.

In California.—Hooper *v.* Wells, 27 Cal. 11.

In Colorado.—Merchants Despatch & T. Co. *v.* Cornforth, 3 Colo. 280; Western Union Tel. Co. *v.* Graham, 1 Colo. 230.

In Connecticut.—Camp *v.* Hartford & N. Y. Steamboat Co., 43 Conn. 333; Welch *v.* Boston & A. R. Co., 41 Conn. 333; Lake *v.* Hurd, 38 Conn. 536; Lawrence *v.* New York, P. & B. R. Co., 36 Conn. 63; Peck *v.* Weeks, 34 Conn. 145; Converse *v.* Norwich & N. Y. Transp. Co., 33 Conn. 166; Derwort *v.* Loomer, 21 Conn. 245; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; Crosby *v.* Fitch, 12 Conn. 410; Williams *v.* Grant, 1 Conn. 487.

In Delaware.—Flinn *v.* Philadelphia, W. & B. R. Co., 1 Houst. (Del.) 469.

In Florida.—Brock *v.* Gale, 14 Fla. 523; Bennett *v.* Tilyaw, 1 Fla. 403.

In Georgia.—Southern Express Co. *v.* Urquhart, 52 Ga. 142; Central Line *v.* Lowe, 50 Ga. 509; East Tennessee & G. R. Co. *v.* Montgomery, 44 Ga. 278; Wallace *v.* Sanders, 42 Ga. 486; Southern Express Co. *v.* Newby, 36 Ga. 635; Berry *v.* Cooper, 28 Ga. 543.

In Illinois.—Boscowitz *v.* Adams Exp. Co., 93 Ill. 523; s. c., 5 Cent. L. J. 58; Erie & Western Transp. Co. *v.* Dater, 91 Ill. 95; s. c., 8 Cent. L. J. 293; Merchants Despatch Transp. Co. *v.* Theibar, 86 Ill. 71; Erie R. Co. *v.* Wilcox, 84 Ill. 239; Indianapolis, B. & W. R. Co. *v.* Strain, 81 Ill. 504; Merchants Despatch Transp. Co. *v.* Bolles, 80 Ill. 473; Milwaukee & St. P. R. Co. *v.* Smith, 74 Ill. 197; Field *v.* Chicago & R. I. Co., 71 Ill. 458; Pennsylvania Co. *v.* Fairchild, 69 Ill. 260; Oppenheimer *v.* United States Exp. Co., 69 Ill. 62; Anchor Line *v.* Dayter, 68 Ill. 369; Northern Line Pkt. Co. *v.* Shearer, 61 Ill. 263; Adams Exp. Co. *v.* Stettaners, 61 Ill. 184; Tyler *v.* Western Union Tel. Co., 60 Ill. 421; Chicago & N. W. R. Co. *v.* Montfort, 60 Ill. 175; American M.U. Exp. Co. *v.* Schier, 55 Ill. 140; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58; Illinois Cent. R. Co. *v.* Adams, 42 Ill. 474; American Exp. Co. *v.* Perkins, 42 Ill. 458; Adams Exp. Co. *v.* Haynes, 42 Ill. 89; Baker *v.* Michigan S. & N. I. R. Co., 42 Ill. 73; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354; Illinois C. R. Co. *v.* Read, 37 Ill. 484; Western Transp. Co. *v.* Newhall, 24 Ill. 466; Illinois Cent. R. Co. *v.* Morrison, 19 Ill. 136; Dunseth *v.* Wade, 3 Ill. (2 Scam.) 285.

In Indiana.—United States Exp. Co. *v.* Harris, 51 Ind. 127; St. Louis & S. E. Co. *v.* Smuck, 49 Ind. 302; Ohio & M. R. Co. *v.* Selby, 47 Ind. 471; Adams Exp. Co. *v.* Fendrick, 38 Ind. 150; Michigan S. & N. I. R. Co. *v.* Heaton, 37 Ind. 448; Indianapolis, P. & C. R. Co. *v.* Allen, 31 Ind. 394; Adams Exp. Co. *v.* Reagan, 29 Ind. 21; Thayer *v.* St. Louis, A. & T. H. R. Co., 22 Ind. 26; Wright *v.* Gaff, 6 Ind. 416.

In Iowa.—Wilde *v.* Merchants Despatch Transp. Co., 47 Iowa, 272; Bancroft *v.* Merchant's Despatch Transp. Co., 47 Iowa, 262; Stewart *v.* Merchants Despatch Transp. Co., 47 Iowa, 229; Mitchell *v.* United States Exp. Co., 46 Iowa, 214; Robinson *v.* Merchants Despatch Transp. Co., 45 Iowa, 470; McCoy *v.* Keokuk & D. M. R. Co., 44 Iowa, 424; Brush *v.* S. A. & D. R. Co., 43 Iowa, 554; Talbott *v.* Merchants Despatch Transp. Co., 41 Iowa, 247; Rose *v.* Des Moines V. R. Co., 39 Iowa, 246; German *v.* Chicago & N. W. R. Co., 38 Iowa, 127; Mulligan *v.* Illinois Cent. R. Co., 36 Iowa, 181; McDaniel *v.* Chicago & N. W. R. Co., 24 Iowa, 412; West *v.* The Berlin, 3 Iowa, 532; Carson *v.* Harris, 4 G. Greene (Iowa), 516; Whitmore *v.* Bowman, 4 G. Greene (Iowa), 148; The Wisconsin *v.* Young, 3 G. Greene (Iowa), 268.

In Kansas.—Leavenworth, L. & G. R. Co. *v.* Maris, 16 Kan. 333; St. Louis, K. C. & N. R. Co. *v.* Piper, 13 Kan. 505; Goggin *v.* Kansas P. R. Co., 12 Kan. 416; Kansas P. R. Co. *v.* Nichols, 9 Kan. 235; Kansas P. R. Co. *v.* Reynolds, 8 Kan. 623; Missouri V. R. Co. *v.* Caldwell, 8 Kan. 244; The Emily *v.* Carney, 5 Kan. 645; Kallman *v.* United States Exp. Co., 3 Kan. 205.

In Keutucky.—Louisville & N. R. Co. *v.* Brownlee, 14 Bush (Ky.), 590; s. c., 9 Cent. L. J. 101; Bryan *v.* Memphis & P. R. Co., 11 Bush (Ky.), 597; Louisville, C. & L. R. Co. *v.* Hedger, 9 Bush (Ky.), 645; Adams Exp. Co. *v.* Loeb, 7 Bush (Ky.), 499; Orndorff *v.* Adams Exp. Co., 3 Bush (Ky.), 194; Keith *v.* Amende, 1 Bush (Ky.), 455; Adams Exp. Co. *v.* Nock, 2 Duv. (Ky.) 562; Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112; Reno *v.* Hogan, 12 B. Mon. (Ky.) 63; Cassilay *v.* Young, 4 B. Mon. (Ky.) 265.

In Louisiana.—Higgins *v.* New Orleans, M. & C. R. Co., 28 La. An. 133; Kelham *v.* The Kensington, 24 La. An. 100; Levy *v.* Pontchartrain R. Co., 23 La. An. 477; Kember *v.* Southern Exp. Co., 22 La. An. 158; Simon *v.* The Fung Shuey, 21 La. An. 363; New Orleans Mut. Ins. Co. *v.* New Orleans, J. & G. N. R. Co., 20 La. An. 302; Frank *v.* Adams Exp. Co., 18 La. An. 279; Brauer *v.* The Almoner, 18 La. An. 266; Mahon *v.* The Olive Branch, 18 La. An. 107; Lewis *v.* The Success, 18 La. An. 1; Levois *v.* Gale, 17 La. An. 302; Wentworth *v.* The Realm, 16 La. An. 18; Roberts *v.* Riley, 15 La. An. 103; Edwards *v.* The Cahawba, 14 La. An. 220; Dunn *v.* Branner, 13 La. An. 452; Thomas *v.* The Morning-Glory, 13 La. An. 269; Hatchett *v.* The Compromise, 12 La. An. 783; Price *v.* The Uriel, 10 La. An. 413; Boyce *v.* Welch, 5 La. An. 623; Fassett *v.* Ruark, 3 La. An. 694; Van Horn *v.* Taylor, 2 La. An. 58; Hunt *v.* Norris, 2 Mart. (La.) 243; Baldwin *v.* Collins, 9 Rob. (La.) 468; Van Hern *v.* Taylor, 7 Rob. (La.) 201.

In Maine.—Little *v.* Boston & M. R. Co., 66 Me. 239; Burnham *v.* Grand Trunk R. Co., 63 Me. 298; Willis *v.* Grand Trunk R. Co., 62 Me. 488; Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462; Sager *v.* Portsmouth, S. & P. & E. R. Co., 31 Me. 228; Plaisted *v.* Boston & K. S. N. Nav. Co., 27 Me. 132; Bean *v.* Green, 12 Me. 422.

In Maryland.—McCoy *v.* Erie & W. Transp. Co., 42 Md. 498; McClure *v.* Philadelphia, W. & B. R. Co., 34 Md. 532; Bankard *v.* Baltimore & O. R. Co., 34 Md. 197; Baltimore & O. R. Co. *v.* Brady, 32 Md. 333; Brehme *v.* Adams Exp. Co., 25 Md. 328; McCann *v.* Baltimore & O. R. Co., 20 Md. 202; Birney *v.* New York & W. P. T. Co., 18 Md. 341; Fergusson *v.* Brent, 12 Md. 9; Ferguson *v.* Cappeau, 6 Har. & J. (Md.) 394; Barney *v.* Prentiss, 4 Har. & J. (Md.) 317; Boyle *v.* McLaughlin, 4 Har. & J. (Md.) 291.

In Massachusetts.—Hoadley *v.* Northern Transp. Co., 115 Mass. 304; Packard *v.* Earle, 113 Mass. 280; Gott *v.* Dinsmore, 111 Mass. 45; Com. *v.* Vermont & M. R. Co., 108 Mass. 7; Knowles *v.* Dabney, 105 Mass. 437;

Pemberton Co. *v.* New York Cent. R. Co., 104 Mass. 144; School District *v.* Boston, H. & E. R. Co., 102 Mass. 552; Pendergast *v.* Adams Exp. Co., 101 Mass. 120; Grace *v.* Adams, 100 Mass. 505; Burroughs *v.* Norwich & W. R. Co., 100 Mass. 26; Sullivan *v.* Thompson, 99 Mass. 259; Perry *v.* Thompson, 98 Mass. 249; Squire *v.* New York Cent. R. Co., 98 Mass. 239; Buckland *v.* Adams Exp. Co., 97 Mass. 124; Ellis *v.* American Tel. Co., 95 Mass. (13 Allen) 226; Gage *v.* Tirrell, 91 Mass. (9 Allen) 299; Judson *v.* Western R. Co., 88 Mass. (6 Allen) 486; Tirrell *v.* Gage, 86 Mass. (4 Allen) 245; Malone *v.* Boston & W. R. Co., 78 Mass. (12 Gray) 388; Alden *v.* Pearson, 69 Mass. (3 Gray) 342; Sanford *v.* Housatonic R. Co., 65 Mass. (11 Cush.) 155; Brown *v.* Eastern R. Co., 65 Mass. (11 Cush.) 97; Hastings *v.* Pepper, 28 Mass. (11 Pick.) 41; Phillips *v.* Earle, 25 Mass. (8 Pick.) 182; Dwight *v.* Brewster, 18 Mass. (1 Pick.) 50; Barrett *v.* Rogers, 7 Mass. 297.

In Michigan.—Great Western R. Co. *v.* Hawkins, 18 Mich. 427; Cleveland & T. R. Co. *v.* Perkins, 17 Mich. 296; Hawkins *v.* Great Western R. Co., 17 Mich. 57; McMillan *v.* Michigan S., etc., R. Co., 16 Mich. 79; Western Union Tel. Co. *v.* Carew, 15 Mich. 525; Detroit & G. R. R. Co. *v.* Adams, 15 Mich. 458; Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489; Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243; American Trans. Co. *v.* Moore, 5 Mich. 368; Merrick *v.* Webster, 3 Mich. 268; Michigan Cent. R. Co. *v.* Ward, 2 Mich. 538.

In Minnesota.—Jacobus *v.* St. Paul & C. R. Co., 20 Minn. 125; s. c., 1 Cent. L. J. 125; Christian *v.* St. Paul & P. R. Co., 20 Minn. 21; Christenson *v.* American Exp. Co., 15 Minn. 270; Cowley *v.* Davidson, 13 Minn. 92.

In Mississippi.—Southern Exp. Co. *v.* Hunnicutt, 54 Miss. 566; Mobile & O. R. Co. *v.* Weiner, 49 Miss. 725; Vicksburg & M. R. Co. *v.* Ragsdale, 46 Miss. 458; Mobile & O. R. Co. *v.* Franks, 41 Miss. 494; Southern Exp. Co. *v.* Moon, 39 Miss. 822; Whitesides *v.* Thurlkill, 20 Miss. (12 Smed. & M.) 599; Neal *v.* Saunderson, 10 Miss. (2 Smed. & M.) 572; Gilmore *v.* Carman, 9 Miss. (1 Smed. & M.) 279.

In Missouri.—Sturgeon *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 569; Oxley *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 629; Clark *v.* St. Louis, K. C. & N. R. Co., 64 Mo. 440; Snider *v.* Adams Exp. Co., 63 Mo. 376; s. c., 4 Cent. L. J. 179; Rice *v.* Kansas P. R., 63 Mo. 314; Tuggle *v.* St. Louis, K. C. & N. R. Co., 62 Mo. 425; Read *v.* St. Louis, K. C. N. R. Co., 60 Mo. 199; Cantling *v.* Hannibal & St. J. R. Co., 54 Mo. 385; Ketchum *v.* American M. U. Exp. Co., 52 Mo. 390; Landes *v.* Pac. R. Co., 50 Mo. 346; Coates *v.* United States Exp. Co., 45 Mo. 238; Wolf *v.* American Exp. Co., 43 Mo. 421; Levering *v.* Union Transp. & Ins. Co., 42 Mo. 88; Hill *v.* Sturgeon, 28 Mo. 323; Carr *v.* The Michigan, 27 Mo. 196; Sturgess *v.* The Columbus, 23 Mo. 230; Smith *v.* Whitman, 13 Mo. 352; Collier *v.* Valentine, 11 Mo. 299; The Missouri *v.* Webb, 9 Mo. 193; Little *v.* Semple, 8 Mo. 99; Dagget *v.* Shaw, 3 Mo. 264; Bird *v.* Cromwell, 1 Mo. 81; Schutter *v.* Adams Exp. Co., 5 Mo. App. 316; Drew *v.* Red Line Transit Co., 3 Mo. App. 495; Lupe *v.* Atlantic, etc., R. Co., 3 Mo. App. 77; Kirby *v.* Adams Exp. Co., 2 Mo. App. 369; s. c., 3 Cent. L. J. 435.

In Nebraska.—Atchison & N. R. Co. *v.* Washburn, 5 Neb. 117.

In New Hampshire.—Rixford *v.* Smith, 52 N. H. 355; Gray *v.* Jackson, 51 N. H. 9; Barter *v.* Wheeler, 49 N. H. 9; Moses *v.* Boston & M. R. Co., 24 N. H. 71; Myall *v.* Boston & M. R. Co., 19 N. H. 122; Bennett *v.* Dutton, 10 N. H. 481; Graves *v.* Ticknor, 6 N. H. 537; Harris *v.* Rand, 4 N. H. 259.

In New Jersey.—Kinney *v.* Central R. Co., 34 N. J. L. (5 Vr.) 513; s. c., 32 N. J. L. (3 Vr.) 407; Tuckerman *v.* Stephens & C. Transp. Co., 32 N. J. L. (3 Vr.) 320; Ashmore *v.* Pennsylvania Steam Towing T. Co., 28 N.

R. Co. *v.* McCloskey, 23 Pa. St. 526; Morrison *v.* Davis. 20 Pa. St. 171; Coxe *v.* Heisley, 19 Pa. St. 243; Chouteaux *v.* Leech, 18 Pa. St. 224; Camden & A. R. Co. *v.* Baldauf, 16 Pa. St. 67; Gales *v.* Hailman, 11 Pa. St. 515; Laing *v.* Colder, 8 Pa. St. 479; Vanderslice *v.* The Superior, 9 Pa. L. J. 116; Bell *v.* Reed, 4 Binn. (Pa.) 127; Forbes *v.* Dallett, 9 Phila. (Pa.) 515; Weir *v.* Exp. Co., 5 Phila. (Pa.) 355; Newburger *v.* Howard & Co.'s Exp., 6 Phila. (Pa.) 174; Ritz *v.* Pennsylvania R. Co., 3 Phila. (Pa.) 82; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533; Beckman *v.* Shouse, 5 Rawle (Pa.), 179; Atwood *v.* Reliance Transp. Co., 9 Watts (Pa.), 87; Warden *v.* Greer, 6 Watts (Pa.), 424; Harrington *v.* McShane, 2 Watts (Pa.), 443; Hart *v.* Allen, 2 Watts (Pa.), 114; Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44; Bingham *v.* Rogers, 6 Watts & S. (Pa) 495; Humphreys *v.* Reed, 6 Whart. (Pa.) 435; Hand *v.* Baynes, 4 Whart. (Pa.) 204.

In Rhode Island.—Hubbard *v.* Harnden Exp. Co., 10 R. I. 244.

In South Carolina.—Levy *v.* Southern Exp. Co., 4 S. C. 234; Porter *v.* Southern Exp. Co., 4 S. C. 135; McClures *v.* Hammond, 1 Bay (S. C.), 99; Gaither *v.* Barnet, 2 Brev. (S. C.) L. 488; Patton *v.* Magrath, Dudl. (S. C.) L. 159; Charleston & C. Steamboat Co. *v.* Bason, Harp. (S. C.) L. 262; Marsh *v.* Blyth, 1 Nott & McC. (S. C.) 170; Baker *v.* Brinson, 9 Rich. (S. C.) L. 201; Stadhecker *v.* Combs, 9 Rich. (S. C.) L. 193; Swindler *v.* Hilliard, 2 Rich. (S. C.) 286; Parker *v.* Brinson, 2 Rich. (S. C.) L. 201; Reaves *v.* Waterman, 2 Spears (S. C.), 197; Singleton *v.* Hilliard, 1 Strobh. (S. C.) L. 203; Cameron *v.* Rich, 4 Strobh. (S. C.) L. 168; s. c., 5 Rich. (S. C.) L. 352.

In Tennessee.—East Tennessee & G. R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272; Memphis & C. R. Co. *v.* Jones, 2 Head (Tenn.), 517; Nashville & C. R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271; Southern Exp. Co. *v.* Womack, 1 Heisk. (Tenn.) 256; Walker *v.* Skipwith, Meigs (Tenn.), 502; Craig *v.* Childress, Peck (Tenn.), 270; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Jones *v.* Walker, 5 Yerg. (Tenn.) 427; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Olwell *v.* Adams Exp. Co. (Tenn.), 1 Cent. L. J. 186.

In Texas.—Cantu *v.* Bennett, 39 Tex. 303; Fowler *v.* Davenport, 21 Tex. 626; Austin *v.* Talk, 20 Tex. 164.

In Vermont.—Newell *v.* Smith, 49 Vt. 255; Cutts *v.* Brainerd, 42 Vt. 566; Mann *v.* Birchard, 40 Vt. 326; Blumenthal *v.* Brainerd, 38 Vt. 402; King *v.* Woodbridge, 34 Vt. 565; Kimball *v.* Rutland & B. R. Co., 26 Vt. 247; Farmers & M. Bank *v.* Champlain Transp. Co., 18 Vt. 131; s. c., 23 Vt. 186; Spencer *v.* Dagget, 2 Vt. 92.

In Virginia.—Virginia & T. R. Co. *v.* Sayers, 26 Gratt. (Va.) 328; Wilson *v.* Chesapeake & O. R. Co., 21 Gratt. (Va.) 654; Friend *v.* Woods, 6 Gratt. (Va.) 189.

In Wisconsin.—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85; Hooper *v.* Chicago & N. W. R. Co., 27 Wis. 81; Wahl *v.* Holt, 26 Wis. 703; Glass *v.* Goldsmith, 22 Wis. 488; Strohn *v.* Detroit & M. R. Co., 21 Wis. 554; Boorman *v.* American Exp. Co., 21 Wis. 152; Betts *v.* Farmers Loan & T. Co., 21 Wis. 80; Martin *v.* American Exp. Co., 19 Wis. 336; Peet *v.* Chicago & N. W. R. Co., 19 Wis. 118.

As to How Far Common Carriers May Limit Their Common-law Liability by Contract, see Central R. & B. Co. *v.* Smitha (Ala.), 4 So. Rep. 708; Alabama & G. S. R. Co. *v.* Sherrod, 84 Ala. 178; Alabama & G. S. R. Co. *v.* Thomas, 83 Ala. 343; Brown *v.* Cunard S. S. Co. (Mass.), 16 N. E. Rep. 717; Tarbell *v.* Royal Exch. Shipping Co. (N. Y.), 17 N. E. Rep. 721; Kaiser *v.* Hoey, 1 N. Y. Supp. 429; Glenn *v.* Southern Exp. Co. (Tenn.), 8 S. W. Rep. 152; Gulf, Colorado & S. F. R. Co. *v.* Trawick (Tex. App.), 4 S. W. Rep. 567; The Portuence. 35 Fed. Rep. 670.

In the case of New York Cent. R. Co. *v.* Lockwood, 84 U. S. (17 Wall. 357; bk. 21, L. ed. 626, after holding that common carriers cannot con-

tract against their liability for negligence, the court reached the following conclusions: (1) That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; (2) that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. Under these rules, and the elaborate reasoning upon which they are based, may common carriers arbitrarily, or by contract, place a value upon articles received for carriage, and in this way limit the amount of recovery against them in case of loss? If they may contract against all liability for loss by means other than their own negligence or fraud, of course they may contract for the amount of recovery in such cases. But in case of a loss through their negligence or fraud, the same reasons, at first view, would seem to exist against contracts limiting the amount of recovery as exact, against contracts for total exemption. Kansas City, St. J. & C. B. R. Co. *v.* Simpson, 30 Kan. 645; Moulton *v.* St. Paul, M. & M. R. Co., 31 Minn. 85; United States Exp. Co. *v.* Backman, 28 Ohio St. 144; Black *v.* Goodrich Transp. Co., 55 Wis. 319.

Same—Stipulating for Notice.—In the case of Ormsby *v.* Union Pac. R. Co., 4 Fed. Rep. 706, a clause in the contract for the shipment of live-stock, providing that the shipper should give notice of any claim for damages before unloading the stock, was held void. See Smither *v.* Louisville & N. R. Co. (Tenn.), 6 S.W. Rep. 209. But it was held, in Sprague *v.* Missouri Pac. R. Co., 34 Kan. 347, a similar stipulation requiring written notice to be given to some officer of the company or to the nearest station agent before the stock was removed from the place of delivery, or was mingled with other stock, was sustained; the court holding it could not be regarded as an attempt to exonerate the railroad company from liability for its negligence;—following Goggin *v.* Kansas Pac. R. Co., 12 Kan. 416. See South & N. Ala. R. Co. *v.* Henlein, 52 Ala. 606; Southern Exp. Co. *v.* Caperton, 44 Ala. 101; United States Exp. Co. *v.* Harris, 51 Ind. 127; Adams Exp. Co. *v.* Reagan, 29 Ind. 21; Squire *v.* New York Cent. R. Co., 98 Mass. 239; Christian *v.* St. Paul & M. R. Co., 20 Minn. 21; Southern Exp. Co. *v.* Hunnicutt, 54 Miss. 566; Dawson *v.* St. Louis, K. C. & N. R. Co., 76 Mo. 514; Oxley *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 629; Rice *v.* Kansas Pac. R. Co., 63 Mo. 314; Westcott *v.* Fargo, 61 N. Y. 542; Macklin *v.* New Jersey Steamship Co., 7 Abb. (N. Y.) Pr. (N. S.) 229; Kaiser *v.* Hoey, 1 N.Y. Supp. 429; Browning *v.* Long Island R. Co., 2 Daly (N. Y.), 117; Place *v.* Union Exp. Co., 2 Hilt. (N. Y.) 19; Capehart *v.* Seabord & R. R. Co., 77 N. C. 255; Newburger *v.* Howard & Co. Exp., 6 Phila. (Pa.) 174; Weir *v.* Express Co., 5 Phila. (Pa.) 353; Porter *v.* Southern Exp. Co., 4 S. C. 135; Texas Cent. R. Co. *v.* Morris, (Tex.), 16 Am. & Eng. R. R. Cas. 259; Southern Exp. Co. *v.* Caldwell, 88 U. S. (21 Wall.) 264; bk. 22, L. ed. 556. But where there is evidence tending to excuse the plaintiff for his delay in making such claim, which is made as soon after the discovery of the shippage as is reasonably possible, an instruction that there should be a strict compliance with the letter of the contract relating to the giving of notice before there could by a recovery, was held to be error in Glenn *v.* Southern Exp. Co. (Tenn.), 8 S. W. Rep. 152.

In Smither *v.* Louisville & N. R. Co., decided by the supreme court of Tennessee, Dec. 15, 1887, an action against a carrier to recover for injuries to stock, the carrier set up a contract whereby the shipper agreed as a condition precedent to his right to recover for injuries to said stock, that he would give notice in writing of his claim therefor to some officer of the carrier, or its nearest station agent, before said stock was removed from its place of destination, or from the place of delivery to the shipper, and before said stock was mingled with other stock. *Held*, that the contract

was uncertain, ambiguous, and an attempt to protect the carrier from loss occasioned by its own fault, by imposing unreasonable duties on the shipper; and the failure to give such notice was not a defence.

AYRES *et al.*

v.

CHICAGO AND NORTHWESTERN R. CO.

(*Wisconsin Supreme Court, March* 27, 1888.)

Carriers of Live-stock—Duty to Carry—Failure to Furnish Cars.—Where a railroad company which is a common carrier of live-stock is requested, a reasonable time beforehand to furnish cars suitable for the transportation of live-stock at a specified time and shipping-point, it is its duty to inform the applicant within a reasonable time whether it can furnish such cars at the time required; and where it fails to give such notice, and the shipper, relying upon its performance of duty as a common carrier, prepares and has his stock ready for shipment at the time and place named, the company is liable for the damages suffered by him by reason of its failure to so furnish the cars.

Same—Who Are.—A railroad company which is engaged in the business of transporting live-stock over all its roads, and is accustomed to furnish reasonable cars therefor upon reasonable notice whenever it is within its power to do so, and which holds itself out to the public generally as a common carrier of live-stock upon such terms and conditions as are imposed in special contracts made by it with shippers, is a common carrier of live-stock with such restrictions and limitations of its common-law duties and liabilities as arise from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under such contracts of carriage.

Same—Inability to Furnish Cars—Evidence.—Defendant railroad company has the burden to prove its inability to furnish cars at a certain time and place as requested for the transportation of live stock, as facts excusing its failure so to furnish such cars necessarily lie peculiarly within the knowledge of its officers and agents.

Same—Delay—Measure of Damages.—A railroad company sued for damages arising from a delay in transporting and delivering live-stock is not liable for loss or damage arising from a delay from Saturday to Monday in the sale of such stock, where delivery was made at the market in time for sale on Saturday.

APPEAL from a judgment in favor of plaintiff, in an action for damages occasioned by a delay in furnishing cars for the transportation of live-stock.

This case was here on a question of pleading upon a former appeal (58 Wis. 537; 16 Am. & Eng. R. R. Cas. 171). The amended complaint is to the effect that the defendant, the Chicago &

Northwestern R. Co., being a common carrier engaged in the transportation of live-stock and accustomed to furnish cars for all live-stock offered, was notified by the plaintiffs, Volney Ayres and George Hagenah, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep, at its station at La Valle, and three at its station at Reedsburg, ready for loading, on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, nothwithstanding it was able and might reasonably have done so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1700. The answer, in effect, admitted the defendant's incorporation with the privileges alleged; "that it was at times engaged in the transportation over its roads, of live-stock, when, and if it was, able to do so, and was accustomed to furnish suitable cars therefor upon reasonable notice when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable despatch, but only upon special contracts at the time entered into between the shipper and this defendant, and upon such terms and conditions as should be agreed upon in writing; that one of the lines of this defendant railway is located as in said amended complaint stated." The answer also, in effect, alleged that "within a reasonable time, and as soon as it reasonably could, and as soon as it was within its power to do so" after the application of the plaintiffs for such cars, the defendant "forwarded four suitable and empty cars to La Valle" and "three suitable and empty cars to Reedsburg," which cars were severally forwarded with reasonable despatch, and arrived in due course, and as soon as they could with reasonable despatch be forwarded over its line; that at the times of such respective shipments the plaintiffs entered into an agreement in writing with the defendant for the transportation of said stock at special rates, and in consideration thereof it was agreed that the defendant should not be liable for loss from the delay of trains not caused by the defendant's negligence. At the close of the trial the jury returned a special verdict to the effect: (1) That, at the times named, the plaintiffs were copartners at Reedsburg, engaged in buying, and shipping live-stock to the Chicago market for sale; (2) that, at the times stated, the defendant was a common carrier, and as such, engaged in the transportation of live-stock and accustomed to furnish cars for and transport all live-stock offered for that purpose; (3) that one of its lines run from La Valle and Reedsburg to Chicago; (4) that, October 13, 1882, the plaintiffs, being fully apprised of the state of the

Chicago market for live-stock and prices, proceeded to buy therefor seven carloads of cattle, hogs, and sheep, four to be loaded at La Valle and three at Reedsburg; (5, 6, 7, 8, 9, 10, and 14) that the plaintiffs notified the defendant's agents at the respective stations, October 13, 1882, to have such cars in readiness at such stations respectively, October 17, 1882, and that such notices were reasonable, and such agents promised to order the cars and have them in readiness at the time; (11) that two cars were furnished at Reedsburg, October 17, 1882, and one October 19, 1882; (12) that the four were furnished at La Valle, October 19, 1882; (13) that the defendant furnished two as soon as it reasonably could, but five it did not; (15) that the plaintiffs received no notice before October 17, 1882, that the cars would not be furnished as ordered; (16, 17, and 18) that prior to that time, and with the expectation that the cars would be on hand as ordered, the plaintiffs had bought sufficient stock to load said several cars, and had the same at said respective stations on the morning of October 17, 1882; (19) that the defendant, being able to furnish such cars, disregarded its duty as a common carrier in live-stock in not having the same on hand when ordered; (20) that, had the cars been so furnished, they would have arrived at Chicago on the morning of October 18, 1882; (21) as it was, two arrived there on Thursday, October 19, 1882, A.M., and five on Friday, October 20, 1882, at 5:45 P.M.; (22, 23, and 24) that the market value of hogs in Chicago on Friday, October 20, was $7.36 per hundred,—on Saturday, October 21, it was $7.11,—and on Monday, October 23, $6.81; (25, 26, and 27) that the loss on the hogs, by reason of depreciation of the market, was $140.08; that the total damages of the plaintiffs on all the stock was assessed at $825.97, made up of the following items, to wit: Taking care of and feeding stock, $50; skrinkage on hogs, cattle, and sheep, $408.35; depreciation in value on hogs and sheep, $172.58; and interest on the above sums until the rendition of the verdict, $195.04. The defendant thereupon moved for judgment in its favor upon the verdict and record, which was denied. Thereupon the defendant moved to set aside the verdict, and for a new trial, upon the grounds that the verdict is against the weight of the evidence, and for errors of the court in its charge to the jury and in its rulings on the trial, and because the damages were excessive and contrary to the proofs; which motion was denied. Thereupon, and upon the motion of the plaintiffs, judgment was ordered in their favor on the special verdict for $825.97 damages and costs. From the judgment entered thereon, accordingly, the defendant brings this appeal.

Jenkins, Winkler & Smith for appellant.

G. Stevens for respondents.

CASSODAY, J.—There is no finding of any agreement on the part of the defendant to have the cars in readiness at the station on Tuesday morning, October 17, 1882. There is no testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said, "All right," he would try and get them, but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock, at their own expense and risk, and that they would assume all risk of injury or damage that the animals might do to themselves, or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defendant causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the station named, as ordered by the plaintiffs, and in the absence of any contract to do so. In Richardson *v.* Railway Co., 61 Wis. 601; s. c., 18 Am. & Eng. R. R. Cas. 530, it was, in effect, held competent for a railroad company engaged in the business of transporting live-stock, to exempt itself by express contract "from damage caused wholly or perhaps in part, by the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals." And it was then said: "Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier, upon mere notice to furnish cars and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live-stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability, or to carry all live-stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should at least have been so alleged, together with an offer to comply with the customary

Agreement to have cars ready—Evidence—Finding.

Limitation of liability by carrier of live stock.

restriction. If it was accustomed to carry all live-stock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate against the plaintiff by refusing to do for him what it was constantly in the habit of doing for others." In that case there was a failure to allege any such custom or holding out on the part of the defendant, or that reasonable notice had been given to the defendant to furnish suitable cars to the person applying therefor, or that the same was within its power to do so; and hence the demurrer was sustained. The allegations thus wanting in that case are present in this complaint. It is, moreover, in effect, admitted that the defendant was at times, when able to do so, engaged in the transportation of live-stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable despatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to, and did, submit to the terms and conditions of carriage imposed by the defendant by signing the special written contracts mentioned. It must be assumed, also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year, for the shipment of similar live-stock under similar circumstances. Otherwise the defendant would be justly chargeable with unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument. We are therefore forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live-stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live-stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson *v.* Railway

Defendant a common carrier of live stock.

Co., *supra*, and is supported by the logic of numerous cases. Railroad Co. *v.* Bank, 123 U. S. 727; Moulton *v.* Railway Co., 31 Minn. 85, 12 Am. & Eng. R. R. Cas. 13; Lindsley *v.* Railroad Co. (Minn.), 31 Am. & Eng. R. R. Cas. 86; Evans *v.* Railroad Co., 111 Mass. 142; Kimball *v.* Railroad Co., 26 Vt. 247, 62 Am. Dec. 567; Rixford *v.* Smith, 52 N. H. 355; Clarke *v.* Railroad Co., 14 N. Y. 570, 67 Am. Dec. 205; Railroad Co. *v.* Henlein, 52 Ala. 606; Baker *v.* Railroad Co., 10 Lea, 304, 16 Am. & Eng. R. R. Cas. 149; Railroad Co. *v.* Lehman, 56 Md. 209; McFadden *v.* Railway Co. (Mo.), 30 Am. & Eng. R. R. Cas. 17; 3 Am. & Eng. Encyc. Law, pp. 1–10, and cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." Johnson *v.* Railroad Co., 4 Exch. 372. Being a common carrier of live-stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence, without jeopardizing its other business as such common carrier. Railway Co. *v.* Nicholson, 61 Tex. 491; Railroad Co. *v.* Erickson, 91 Ill. 613; Ballentine *v.* Railroad Co., 40 Mo. 491; Guinn *v.* Railway Co., 20 Mo. App. 453. Whether the defendant could with such diligence so furnish upon the notice given was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon nor expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence, under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different States. Along each and all of these lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company, to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or un-

Defendant's duty to furnish cars—Notice.

loaded. Many will necessarily be at the larger centres of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be, in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited. The important question is whether the burden is upon the plaintiffs to prove that the defendant might, with such reasonable diligence, and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Hepler *v.* State, 58 Wis. 46. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem *v.* Blake, 16 Wis. 102; Beckmann *v.* Henn, 17 Wis. 412; Noonan *v.* Ilsley, 21 Wis. 144; Railroad Co. *v.* Bacon, 30 Ill. 352; Brown *v.* Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination, and might have been emptied with reasonable diligence. but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders. or superior obligations. The ability of the defendant to so furnish with ordinary diligence, upon the notice given, upon the principles stated, was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live-stock for such cars to be furnished at a time and station named. it becomes the duty of

Burden of proving that defendant might have furnished cars.

the company to inform the shipper, within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live-stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether having so engaged, it may not discontinue the same. The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did—to wit, Thursday October 19, 1882, A.M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago, on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Railroad Co. *v.* Erickson, *supra*. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest error, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Delay—Damages.

Common Carriers—Who Are.—For a full discussion of the question of who are common carriers, see, *ante*, Schloss *v.* Wood, 492 and note, 495–498

Same—Delay in Transportation.—It is held in Missouri Pac. R. Co. *v.* Cornwall, decided by the supreme court of Texas, May 4, 1888, that a railroad company is liable for delay in transporting cattle accepted by it for carriage, regardless of the special contract made with the shipper limiting its liability to injury resulting from wilful negligence. Following, Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166. It is said in Gulf C. & S. F. R. Co. *v.* Ellison, (Tex.), 7 S. W. Rep. 785, that in an action for damages to cattle in shipping, on the ground of unreasonable delay and improper operation of the train, evidence that the cattle were shipped on a way-train, which necessitated many stops, is admissible, although defendant made no contract not to ship on such train, nor to transport at a given rate of speed; and evidence of rough handling of the train, and that injury resulted from the jerking in stopping and starting so often, is competent, as tending to show carelessness.

As to the liability of carriers for damages occasioned by failure to ship goods or freight and for delay in carriage, see, *ante*, Merchants' Despatch Transportation Co. *v.* Hately, 565 and note 571.

Same—Measure of Damages.—The measure of damages in an ordinary case of delay by a common carrier of goods is the difference in their market value at the time and place when actually delivered and when they should

have been delivered, St. Louis, I. M. & S. R. Co. *v.* Mudford, 48 Ark. 502; s. c., 32 Am. & Eng. R. Cas. 539; *In re* Peterson 21 Fed. Rep. 885; The Golden Rule, 9 Fed. Rep. 334.

In St. Louis, I. M. & S. R. Co. *v.* Mudford, 48 Ark. 502; s. c., 32 Am. & Eng. R. R. Cas. 539, it is said that the measure of damages for delay in transportation of goods beyond the time specified, or if not specified beyond a reasonable time, is as a general rule the difference between the value at the time and place they should have been delivered, and their value when they were in fact delivered, computed at the place of destination with interest less the freight unpaid. If their is no market value at that point such value may be ascertained by proof of the market value at other convenient points. East Tenn. V. & G. R. Co. *v.* Hale, 85 Tenn. 69.

In the case of Schmidt *v.* Steamship, Pa. 4 Fed. Rep. 548. it is said that if, in consequence of the refusal to deliver, the holder of the bill of lading loses the benefit of the sale which he had made of the goods to arrive, and of which he had notified the master of the vessel at the time of demand, the measure of damages is the difference between the price at which such sale was made and the market price at the time of the actual delivery by the master. See as to measure of damages, *ante*, Hass *v.* Kansas City Fort Scott & Gulf R. Co., 572 and note 575.

Same—Negligence in Carriage—Damages.—In Missouri Pac. R. Co. *v.* Cornwall, decided in the supreme court of Texas, May 4, 1888, it is said that in an action by a shipper against a common carrier for negligence in transporting cattle, the court properly refused to instruct the jury that "if any cattle were injured, or had died from the effects of being overheated on account of hot weather, then plaintiff could not recover," the jury having been instructed that defendant would not be liable for any loss not caused by want of care, and there being evidence of negligence by defendant in watering the cattle, such instruction might tend to mislead the jury by eliminating the condition of the weather in determining the question of want of care by the defendants in supplying the cattle with water.

OWEN *et al.*

v.

LOUISVILLE AND NASHVILLE R. CO.

(*Kentucky Court of Appeals, Nov.* 15, 1888.)

Carrier of Live-stock—Defective Apparatus—Contributory Negligence—Question for Jury.—A common carrier of live-stock is required to furnish a safe means of unloading and delivery; and where a platform on which a horse was unloaded from a car, by the agents of its owner, was defective and unsafe, and such agents may have had knowledge of its condition, it was altogether for the jury to determine whose negligence caused the injury.

Same—Notice of Claim for Damages—Waiver.—Notice of a claim of damages for injury to live-stock is waived by a railroad company, where its general agent, in whose presence the injury occurs, has the animal examined by a surgeon, and return to the point of shipment.

Same—Contributory Negligence—Pleading.—In an action for damages for injury to plaintiff's horse while being unloaded from defendant's car, by plaintiff's agent, an answer pleading that the wildness of the horse, together with the negligence of such agents, caused him to fall, denying all injury, but not alleging that the fall would not have occurred without the negligence of such agents, cannot be considered as a plea of contributory negligence requiring a reply.

APPEAL from a judgment of nonsuit in an action for damages for injury to a horse belonging to plaintiffs, while in transportation over defendant's road. The opinion states the case.

Brown, Humphrey & Davie and *Luther C. Willis* for appellants.

Barnett, Noble & Barnett and *Wm. Lindsay* for appellee.

PRYOR, J.—The appellants, Owen & McKinney, being the owners of a valuable trotting-horse, and desiring to exhibit him at a fair near Chicago, Ill., in the month of September in the year 1886, contracted with the appellee, the Louisville & Nashville R. Co., to carry the horse from Shelbyville, Ky., where the appellant lived, to the fair-grounds at Chicago. It seems that the horse was seriously injured in taking him from the cars at the place of destination (the fair-grounds), and the appellants instituted this action against the railroad company to recover damages for the injury sustained, alleging that it resulted from an insufficient and defective chute or platform upon which the horse was required to walk in leaving the car, and from which he fell to the ground, crippling him, as the proof conduces to show, for life. The negligence and improper conduct of the agents of the company is also alleged, in compelling the agent of the appellants to take the horse from the car onto such an unsafe platform, as one of the grounds of recovery. The contract of shipment is filed by the defendant, containing a stipulation by which it is agreed on the part of the shipper, as a condition precedent to his right of recovery for the loss or injury to stock, "he will give notice in writing of his claim thereof to some officer of the party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from place of delivery of the same to the party of the second part, and before such stock is mingled with other stock." As one of the defences to the action, it was pleaded that this notice in writing had not been given as provided by the contract; that the horse was delivered in good order to the agents of the plaintiffs for unloading; and in taking the horse from the cars, the plaintiffs' agents, by their negligence, and by reason of the wildness and unruliness of the horse, suffered him to jerk, rear, and fall, but he was not hurt or otherwise injured thereby. There was no denial of

Facts.

the alleged negligence on the part of plaintiffs' agents in removing the horse from the car, and, if this statement by way of defence is to be regarded as a plea of contributory negligence, the averment in this regard must stand admitted as true. The failure to give the written notice is admitted by the reply, and matters pleaded in avoidance, that were deemed insufficient, or as not having been sustained by the testimony, and a nonsuit ordered. It is argued by counsel for the railroad company that, if the evidence introduced was such as should have been passed on by a jury, still, the answer alleging contributory neglect being undenied, the nonsuit was proper, and we will therefore consider first the sufficiency of this branch of the defence. The alleged injury is said by the plaintiffs to have resulted from the defective platform, that was only 10 feet in width, with no support or railing on either side; and the horse by reason of this defect fell from the platform and was injured. In answer to this complaint is a traverse of the facts alleged, with the averment that the horse fell by reason of the negligence of the agent of the plaintiffs, but was in no manner injured. While the agent may have been negligent, it does not appear nor is it alleged that but for this negligence the horse would not have fallen from the platform; and, all injury of any kind being denied, it seems to us the defence here interposed is not one of contributory negligence, and therefore no reply was required. The appellee maintains that, as gross negligence is alleged against the defendant, no plea of contributory neglect will be allowed; and cases are cited, arising under the statute, authorizing the recovery of punitive damages, where the life of one is lost or destroyed by the wilful neglect of another person, corporations or companies, etc. This character or degree of neglect and the recovery under it is the creature of the statute, and not applicable to the loss or destruction of the property of one by reason of the neglect of another. In the latter class of cases the common-law rule prevails, and whatever may be the degree of neglect alleged in the petition, whether gross or ordinary, the defence of contributory neglect may be pleaded, and if it appears that the injury would not have occurred but for the negligence of the party complaining, or the defendant could not by the exercise of ordinary care have avoided the result of the plaintiffs' neglect, the plea of contributory neglect is made out. Not so in an action to recover punitive damages under the statute for the destruction of human life by reason of wilful neglect. In such a case wilful neglect must be established, and, when made to appear, shows an absence of all care for the protection of the person whose life has been destroyed.

Defective platform—Plea of contributory negligence.

The principal inquiry in this case comes from that provision of

the contract by which notice in writing is to be given by the shipper to some officer of the company, or its nearest station agent, before the stock is removed from its place of destination, of his intention to claim damages for the injury sustained. We do not understand this clause of the contract as exempting this railroad company from liability when the stock it undertakes to carry is injured by its negligence or that of its employees, but by its terms the shipper agrees that, if his stock is injured, he will give the notice in writing of his purpose to claim damages, before his stock is removed from its place of destination. The company, when obtaining such a notice, will have an opportunity of investigating at once the cause and extent of the injury, so as to adjust the claim, if proper; and, if executed in good faith, this stipulation must result in a benefit to both the owner of the stock and the carrier. It is not an unreasonable stipulation, or one that the shipper cannot in a reasonable time comply with. Goggin *v.* Railway Co., 12 Kan. 416; Navigation Co. *v.* Bank, 6 How. 344; Express Co. *v.* Hunnicut, 54 Miss. 569; Railway *v.* Morris, 16 Am. & Eng. R. R. Cas. 259. The appellants having failed to give the notice, it follows that a recovery must be denied unless the company has waived the notice, or its conduct has been such with reference to the matter in controversy as precludes it from now setting up the want of notice as a defence. It is insisted by the appellants that the agent of the company had notice of the injury at the time the accident happened, and therefore it was unnecessary to notify that agent, or any other, in writing, of the purpose to claim damages. We have already adjudged that this stipulation is valid, and if the mere fact of knowledge on the part of those in charge of the train of the injury to the stock is held to be sufficient, it renders this clause a nullity; for it must be assumed that when such accidents occur those in charge of the train have a knowledge of that fact, and, having such knowledge, in every instance the written notice may be dispensed with, and this stipulation entirely ignored. Under the contract between the parties, the appellee undertook to deliver the horse at the Chicago Fair-Grounds; and, in order to do this, the shipment had to be made, after leaving the line of appellee's road, over the road of the J., M. & I. R. Co.; this latter company undertaking, so far as this case is now presented, to deliver the horse at the place of destination for the appellee, the Louisville & Nashville R. Co. The agents and employees of the one road became the agents and employees of the other, in so far as it affected the transportation and delivery of the horse. The horse was injured in presence of those in charge of the train when unloading at the depot at the fair-grounds, and the agent was invited to examine him at the place of the injury. In his

Necessity for giving notice.

crippled condition the horse was brought back from Chicago to Shelbyville on the same line of road, and delivered at the same depot from which he was originally shipped, and where the owners lived. The fact of the injury and of the appellant's claim was not only known to the officers and agents of the company, but an actual inspection or examination of the horse made,—as the proof conduces to show, by a surgeon, at the instance of the company, skilled in the treatment of such injuries as the horse had received. The animal was in fact removed by those who had him in charge when being carried to Chicago, and when the injury occurred, and by that same company brought back to Shelbyville, and redelivered to the owners. This was in less than one month after the injury was received; and when this action was instituted the appellee for the first time alleged the failure of the owners to give the written notice mentioned in the contract. It was then too late to interpose such an objection. The opportunity was not only afforded the appellee of examining the horse, but after being injured he was returned by the same company to the owners in his crippled condition, and redelivered at the depot from which he originally started. If, therefore, the agents of the Louisville & Nashville R. Co. had notice of this injury, and removed the horse, although at the instance of the owner, on their trains, back to the owners at Shelbyville, the removal must be regarded as by the consent of both parties, and a waiver of the notice required by the contract. A reply alleging this state of fact, having been filed, was a complete answer to this ground of defence.

Another stipulation of the contract required the appellants or their agents to unload the stock, and it is therefore insisted that a delivery of a horse at the fair-grounds, in the car, was a compliance on the part of the company. The proof shows that the cars of the appellee or those of its agent ran to the fair-grounds, where there was a depot at which stock was delivered. There was no obligation on the part of the shipper, whether the destination was Chicago or the fair-grounds, to provide a safe mode of delivery by having a platform suitable for the purpose of unloading stock. This obligation rested on the company, and if the agents of the company required appellant's agent to remove the horse from the car on a dangerous platform, one not ordinarily safe for the delivery of stock, and the horse was injured thereby, the company is responsible, although the agent of the owners may have been apprised of the danger. If the platform was one suitable for the delivery of live-stock, and the injury resulted from the negligence of the agents of the owners, the appellee cannot be made to answer in damages. While the court does not adjudge as to the question of negligence on the part of the appellee, that being

Negligence in unloading horse for jury.

a question for another tribunal, we think it manifest that, from the testimony introduced, the issue as to negligence should have been submitted to the jury. We have failed to notice other defences made and questions raised, and have considered only the points made in the court below, and in this court, that caused the peremptory instruction. All other questions made are left open. The judgment below is reversed, and the cause remanded, with directions to award the appellants a new trial, and for proceedings consistent with this opinion.

REHEARING.

PRYOR, J.—We have held, in the opinion already delivered, that the stipulation contained in the contract by which the shipper agrees not to remove the injured stock before notice of claim for damages is not unreasonable; but at the same time this stipulation must be given a reasonable construction. The object is that the company may have at once an opportunity to investigate the extent of the injury, and its cause; but here the horse, having been badly crippled,—a fact known to the agents of the company,—was in a few days brought back from Chicago by the same agents, to his owners at the depot of appellee's road in Shelbyville, where the horse was or could have been examined by the company or its agents, and in fact, as the proof conduces to show, was examined. And now it is maintained that the removal was by the plaintiff himself, and not by the company, when the latter accepted the cost of transportation with a full knowledge of the horse's condition and furnished them cars and the same agents to bring him back to Kentucky. The removal was by the consent of the company, and was a waiver of the notice required; and this waiver or estoppel is specially pleaded: and not only so, it is further pleaded that the company agreed to bring the horse back to Kentucky when he was shipped to Chicago for exhibition. Whether there was a claim for damages or not is immaterial: the action of the company in removing the horse was a waiver, and the action can be maintained without the notice. Petition overruled.

Waiver of notice of injury.

Brown, Humphrey & Davie and *L. C. Willis* for appellants.
Barnett, Noble & Barnett and *Wm. Lindsay* for appellee.

Carriers of Live Stock—Injury—Notice of Claim.—For a full discussion of the question of the validity of contracts limiting the time within which notice of claim for damages are to be presented, see, *ante*, Missouri Pac. R. Co. *v.* Fagan, 666, and note, 671–679; Glenn *v.* Southern Ex. Co., *ante*, 627, and note, 629.

STERNBERGER

v.

CAPE FEAR AND YADKIN VALLEY R. CO.

(*South Carolina Supreme Court, Oct.* 30, 1888.)

Carriers—Interstate Commerce—What Constitutes.—The transportation of freight from one state into another, or over connecting lines between two points within the same state where one of such connecting lines runs entirely in another state, is interstate commerce, of which the railroad commission of South Carolina can have no jurisdiction.

APPEAL from a decision of a circuit judge dismissing a complaint made to the South Carolina Railroad Commission against defendant. The opinion states the case.

Jos. H. Earle, Attorney-General, for appellant.

Knox Livingston for respondent.

SIMPSON, C.J.—The plaintiff (appellant), who lives at Tatum, Marlboro county, had consigned to him from Charleston, S. Car., a ton of commercial fertilizers. The railroad route from Charleston to Tatum over which this fertilizer was transported was first over the Northeastern Railroad and the Cheraw & Darlington Railroad to Cheraw, both roads being entirely in South Carolina; thence from Cheraw over the Cheraw & Salsbury Railroad to Wadesboro, in North Carolina, this road being partly in this State and terminating in North Carolina, at Wadesboro; thence over the Carolina Central Railroad, being entirely in North Carolina, to Shoe Heel, in North Carolina; thence over the Cape Fear & Yadkin Valley Railroad, principally in North Carolina, to Tatum, in South Carolina, which point is about six miles from Bennettsville, S. Car., where the railroad terminates. The freight charged to plaintiff on his ton of fertilizer to Tatum was $4.40, while the freight to Bennettsville, six miles further, on the same article, was only $4. Under these circumstances, the plaintiff complained to the railroad commission that the defendant was violating section 1443, Gen. Stat., which forbids common carriers to charge more freight on the same goods for transporting the same a shorter than a longer distance in one continuous carriage. This complaint was investigated by the railroad commission, the defendant resisting the complaint upon the grounds, first, that Bennettsville was

Facts.

a competitive terminal point, and therefore exempt from the provisions of section 1443, Gen. Stat., by the terms of the proviso to said section; and, second, that the State railroad commission had no jurisdiction of the matter, inasmuch as it involved interstate commerce. These defences were overruled by the railroad commission, and the defendant was required to correct its rates and to refund the excessive charges. From this judgment, the defendant appealed to the circuit judge of the Fourth circuit, who, after full testimony upon the question whether Bennettsville was a competitive terminal point, sustained defendant's appeal upon both the grounds taken; holding that Bennettsville, being a competitive terminal point, was exempt from the operation of section 1443, Gen. Stat., and also that the matter involved was interstate commerce, and therefore beyond the jurisdiction of the State railroad commission. He consequently decreed and adjudged that the judgment of the commission be reversed. From this decree and judgment, the plaintiff has appealed to this court, assigning error to the circuit judge in overruling the two grounds upon which the judgment of the commission was based.

We will take up these grounds in the inverse order in which they were discussed by the circuit judge. And, first, did the railroad commission have jurisdiction? or did the matter involve and belong to interstate commerce, thereby depriving the state commission of jurisdiction? The word "commerce" is a term of broad signification. It embraces considerably more than the mere bargain and sale of goods and merchandise and other property between individuals. Yes, it includes all the instruments by which it may be conducted. It embraces transportation by railroads, steam-boats, ferries, etc., and all common carriers. It may be carried on between individuals in the same state, or over railroads lying in the same state. It is then internal commerce, and is under the control of state legislation. Or it may be conducted and engaged in between individuals living in different states, or transported over railroads lying in and running through different states. It is then interstate commerce, and its regulation belongs to congress. Now, here was a purchase by the plaintiff, a citizen of South Carolina, of a ton of commercial fertilizer, from a citizen in Charleston, both of the same state. Thus far, this transaction belonged to internal or domestic commerce, and would be subject to state control, if any. But the plaintiff lived at Tatum, in Marlboro county, some distance from Charleston, and to reach him his fertilizer had to be transported by railroads to him; and, as it turns out, by railroads, some entirely in South Carolina, some in North Carolina, and others partly in both. Now, while it is admitted that our state

Traffic constituted interstate commerce.

railroad commission has jurisdiction over all railroads commencing and terminating in the state, and over all transportation between points within the state, yet it is equally true that it has no jurisdiction over transportation running from the state into another state, or from another state into this state, or running entirely in another state. Transportation like that suggested in the two first classes mentioned would be interstate commerce, while that in the last class would be the domestic commerce of the state in which it might be conducted. Applying these principles to the case in hand, it seems that only two of the railroads over which this ton of fertilizer was transported commence and terminate within the limits of the state,—the Northeastern and the Cheraw & Darlington; and if the question here had originated out of the freights of these two roads only, one or both, then there could have been no doubt as to the jurisdiction of the commission. But the Cheraw & Salsbury road is partly in this state and partly in North Carolina, and the Carolina Central road, from Wadesboro to Shoe Heel, is entirely in North Carolina, and then the Cape Fear & Yadkin Valley is partly in the two states. Our commission has no right to adjudicate questions of freight on roads like these last three, for the simple reason that they are not South Carolina roads. Suppose that the plaintiff had purchased this ton of fertilizer at Cheraw, and had then consigned to himself at Wadesboro, in North Carolina, could our railroad commission have regulated the freight on that transportation? We think not. Or suppose he had purchased at Wadesboro, and shipped to Shoe Heel, certainly upon that transportation our commission could have taken no jurisdiction, let the freight have been as exorbitant as possible. Neither would shipping from Shoe Heel to Tatum, the road running from North Carolina into our state, have given the commission jurisdiction. See our own case of Commissioners *v.* Railroad Co., 22 S. C. 220, where this court said: "Any regulation of freights for the transportation from Columbia, in this state, to points in the state of North Carolina, by the statutes of this state is beyond the power of the state, because of its being an invasion of the power exclusively vested in congress by the constitution of the United States." See also decision of Mr. Justice Field in the case of Steam-Ship Co. *v.* Board, 18 Fed. Rep. 10 (decided 17th September 1883, Dist. Ct. Cal.); Lord *v.* Steam-Ship Co., 102 U. S. 541. We think this ton of fertilizer, in its transportation from Charleston to Tatum, has practically taken the course indicated. First it reached Cheraw on South Carolina roads; then it was substantially shipped anew into North Carolina, halting at Wadesboro, to be reshipped to Shoe Heel; and thence back into South Carolina to Tatum; the route being partly on roads over which the freight

thereon would be subject to the supervision of the commission if the charges complained of had been made there, and partly on roads over which the commission has no jurisdiction. The charges complained of arising on settlement with one of these last roads, the judgment of the circuit judge is sustained upon the ground that the railroad commission was without jurisdiction. Having reached the conclusion above, it is needless to discuss or adjudicate the other question as to whether Bennettsville is a competitive terminal point in the sense of the proviso to section 1443, and therefore exempt from said section. In fact, if the commission had no jurisdiction, the case was not properly before that commission, and the question suggested could neither have arisen before it, nor have been legally considered by it. We do not regard said question as before us. We therefore pronounce no judgment thereon. It is the judgment of this court that the judgment of the circuit judge be affirmed upon the ground hereinabove given.

McIVER and MCGOWAN, JJ., concur.

What Constitutes Interstate Commerce.—See *Ex parte* Koehler, 30 Am. & Eng. R. R. Cas. 71; Wabash, etc., R. Co. *v.* People, 26 Am. & Eng. R. R. Cas. 1; *Ex parte* Koehler 21 Ib. 52; *Ex parte* Koehler, 29 Ib. 44.

CONNOR *et al.*

v.

VICKSBURG AND MERIDIAN R. CO.

(U. S. Circuit Court, E. D. Missouri, Oct. 5, 1888.)

Courts—Jurisdiction of Federal Courts—Citizenship.—The Federal courts have jurisdiction over civil actions for the violation of the Interstate Commerce Act, without regard to the diverse citizenship of the parties; and, therefore, such an action can be brought only in the district of which the defendant is an "inhabitant" within the meaning of the act of March 3, 1887.

Same—Corporations—Citizenship.—For the purpose of determining the jurisdiction of the Federal courts, a corporation is to be considered a citizen of the state which created it and where its chief office and place of business is located.

Same—Railroad in Another State.—The question of the jurisdiction of a Federal court over a railroad corporation does not depend on the diverse citizenship of the party, and the mere fact that defendant has an office and an agent within the district, for the purpose of making freight con-

tracts, will not give the court jurisdiction, where all of defendant's road, and its principal office and place of business, are within the state which created it, altogether outside of the district.

ON motion to dismiss an action for the violation of the Interstate Commerce Act for the want of jurisdiction.

The petition states that the plaintiffs are citizens of Missouri, engaged in the shipment of grain to Mississippi, Alabama, and other southern States; that defendant is a railroad corporation created under the laws of Mississippi and having its principal office in that State; that defendant also has an office and agent in St. Louis, Missouri, for the transaction of its business as a common carrier; that defendant is a common carrier engaged in the transportation of property, under a common control, management, or arrangement for a continuous carriage or shipment from one State of the United States to other States of the United States, etc., within the meaning and purview of the Act of Congress of April 5, 1887, known as the Interstate Commerce Act, and that defendant is subject to the provisions of that act; and that being such common carrier, so engaged in the transportation of property, defendant, by an unlawful system of rebates, drawbacks, false bills of lading, and other false and fraudulent devices and discriminations against plaintiffs, instituted and put in force and practised by defendant, in violation of said act of congress, has damaged plaintiffs $50,000; wherefore they sue.

Process in the suit was returned as served upon the agent of the defendant at St. Louis.

The grounds of the motion to dismiss are stated in the opinion.

Pollard & Werner for defendant for the motion.

Minor Meriwether and *Henry W. Bond* for plaintiffs, *contra.*

THAYER, D. J.—In this case plaintiffs are citizens of Missouri, and the defendant is a corporation created by the laws of the State of Mississippi, and has its chief office and place of business in that State. The petition avers that defendant also has an office in the city of St. Louis, and has an agent in this city for the transaction of its business. Process has been served on the alleged agent, in accordance with the laws of Missouri regulating service upon foreign corporations. Case stated.

Defendant appears specially and moves to set aside the marshal's return of service, and to dismiss the suit on two grounds: (1) because the petition shows that the cause of action is of such character that defendant can only be sued thereon in a Federal court, in the district where it was incorporated and has its chief office,—that is, in Mississippi; (2) because (as it is claimed) the

person on whom process was served was not its agent at the time of service.

An objection is raised to any consideration of the first point of the motion, for the reason that it is not raised by demurrer. With reference to that objection it is only necessary to say that where it is claimed that a petition shows on its face that the court is without jurisdiction of the cause, I can conceive of no substantial reason why the defendant should not be permitted to move a dismissal of the same on that ground. In such case it is, in my opinion, wholly immaterial whether the jurisdictional question is raised by demurrer or by motion to dismiss.

I accordingly proceed to consider whether the first point of the motion is well taken.

Section 1 of the act of March 3, 1887, regulating the jurisdiction of Federal courts, provides that "no civil suit shall be brought before either of said courts (district or circuit) against any person . . . in any other district than that whereof he is an inhabitant; but, where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Jurisdiction of Federal courts—Citizenship.

In the present case it is obvious that the jurisdiction of this court (if it has jurisdiction) does not depend "only on the fact" that plaintiff and defendant are citizens of different States.

The action is brought to recover damages sustained by reason of violations of an Act of Congress approved February 4, 1887 (21 U. S. Stat. at L. p. 379), commonly called the "Interstate Commerce Law."

The petition is drawn with especial reference to the provisions of that law, and states a cause of action over which the Federal courts are expressly given jurisdiction by § 9 of the act, without reference to the citizenship of the parties.

It has been suggested that the petition states a cause of action at common law as well as under the statute; but it is unnecessary to determine that question on this motion, for even if the acts complained of do give a right of action at common law, it is also true that they amount to a violation of the Interstate Commerce Act; and the Federal courts have been given jurisdiction of suits brought to recover damages growing out of violations of that act, without reference to the citizenship of the parties litigant. See § 9, *supra*.

In any view of the case made by the petition, it is clear that the jurisdiction of this court is not dependent "only on the fact" of diverse citizenship; therefore if jurisdiction of the cause is retained, it must be on the ground that the defendant

is an inhabitant of this district, within the meaning of the act of March 3, 1887.

For the purpose of determining whether defendant is an inhabitant of the district, I shall assume that the averments of the petition are true; that is, that it keeps an office and an agent in this district for the purpose of making freight contracts, but that its chief office as well as its railroad is located in the State of Mississippi.

Defendant an inhabitant of Mississippi district.

Does the fact, then, that it has an office and an agent here constitute it an inhabitant of the district?

This precise question, for reasons that appear to me to be sound, has been decided in the negative by the circuit court of the United States for the southern district of New York and northern district of Illinois. Halstead *v.* Manning, 34 Fed. Rep. 565; Gormully *v.* Pope Mfg. Co., Id. 818. See also Reinstadler *v.* Reeves, 33 Fed. Rep. 308.

It has long been the settled rule that a corporation created by a certain State, by virtue of that fact, is to be deemed a citizen of that State for the purpose of determining questions of Federal jurisdiction dependent on citizenship.

For the same reason that entitles it to be regarded as a citizen of the State that creates it, it may also be said to be an inhabitant of such State,—especially if (as in this case) its chief office and place of business is there located.

In one case at least a corporation has been termed an inhabitant as well as a citizen of the State under whose laws it was incorporated. Thus in the case of Louisville, C. & C. R. Co. *v.* Letson, 43 U. S. 2 How. 556 (11 L. ed. 377), the court says: "A corporation created by a State . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State."

If an artificial person, like a corporation, may be an inhabitant of a State or district, it can, with most propriety, be said to be an inhabitant of the State that created it, or of the State where it keeps its records and principal office, and where its chief officers reside or may most usually be found.

These, in my judgment, are the tests which should determine the domicile of a corporation; and, tried by such tests, the defendant is clearly an inhabitant of the district of Mississippi.

No other rule, indeed, seems to be applicable to the determination of the question of domicile, unless it be held that a corporation is an inhabitant of any and every State where it has an office and transacts business.

But if the latter position be assumed, no reason is perceived why it might not, with as good reason, be held that a corpora-

was made by the court below: The Chicago, Burlington & Quincy R. Co.'s road extends from Council Bluffs, Iowa, to Chicago, Ill., Chicago being its eastern terminus, at which place its road connects with the railroad of the other defendant. The Pennsylvania Co.'s road extends from Chicago to Pittsburgh, Pa., that being its eastern terminus. On the 20th day of May, 1885, the plaintiffs, at Council Bluffs, delivered to the Chicago, Burlington & Quincy R. Co. the goods mentioned in the complaint to be transported to Litchfield, Conn., and received from the company the following bill of lading:

"COUNCIL BLUFFS, May 20, 1885.

"Received from P. T. Mayne, in apparent good order, by the Chicago, Burlington & Quincy R. Co., to be transported to ——, the following articles, as marked and described below, subject to the general rules of the said company, and the conditions and regulations of their published freight tariff applying on shipment of freight from this station to the destination named; it being expressly agreed and understood that the said Chicago, Burlington & Quincy R. Co., in receiving the said packages to be forwarded as aforesaid, assumes no other responsibility for their safety than may be incurred on their own road.

Marks and consignee.	Description of articles as given by consignor.
Mrs. H. E. Palmer, Litchfield, Ct. (Schedule of Articles) Guaranteed.	H. H. Goods. Wt. 4200 pounds. O. R. & Rel. Chas. Keith. D."

The Chicago, Burlington & Quincy R. Co. transported the goods, upon its own road, safely and without damage, to Chicago, arriving there the 23d day of May, 1885, and on that day, being Saturday, placed the car containing the goods upon a piece of railroad track occupied in common by both the defendants, and called a "Y." At about half past 10 in the forenoon, the car containing the goods was taken by the Pennsylvania Co. and switched onto its track, and taken to its freight depot, where the goods were unloaded by the workmen of the Pennsylvania Co., and placed in its freight depot, May 25, 1885. At the time the goods were so taken by the Pennsylvania Co., the bill of lading accompanying the same was also delivered to that company, but by mistake on the part of some of the officers of the Chicago, Burlington & Quincy R. Co. the bill of lading was not marked, "Freight charges guaranteed," as it should have been. The goods remained in the depot of the Pennsylvania Co. till the 26th of May, 1885, when the proper officers of that company notified the Chicago, Burlington & Quincy R. Co. that

L. ed. 571; St. Louis *v.* Wiggins Ferry Co., 78 U. S. (11 Wall.) 423; bk. 20, L. ed. 192; United States Bank *v.* Planters' Bank, 22 U. S. (9 Wheat.) 910; bk. 6, L. ed. 245; Bonaparte *v.* Camden & A. R. Co., 1 Baldw. C. C. 205; Greeley *v.* Smith, 3 Story C. C. 76; Farnum *v.* Blackston Canal Co., 1 Sumn. C. C. 46; Barclay *v.* Levee Com., 1 Woods C. C. 254.

And this is true irrespective of the individual citizenship of the members constituting the corporation. See Baltimore & O. R. Co. *v.* Cary, 28 Ohio St. 208; Quigley *v.* Central Pac. R. Co., 11 Nev. 350; Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544; Ohio & M. R. Co. *v.* Wheeler, 66 U. S. (1 Black) 286; bk. 17, L. ed. 130; Baltimore & O. R. Co. *v.* Harris, 79 U. S. (12 Wall.) 65; bk. 20, L. ed. 354; Hatch *v.* Chicago, R. I. & P. R. Co., 6 Blatchf. C. C. 105; Pomeroy *v.* New York & N. H. R. Co., 4 Blatchf. C. C. 120; Minnett *v.* Milwaukee & St. P. R. Co., 3 Dill. C. C. 460; Farmers' L. & T. Co. *v.* Maquillan, 3 Dill. C. C. 379.

Same—Jurisdiction of Federal Courts.—As to jurisdiction "citizenship" means simply residence. Shelton *v.* Tiffan, 47 U. S. (6 How.) 162; bk. 12, L. ed. 387; Gassies *v.* Ballan, 31 U. S. (6 Pet.) 761; bk. 8, L. ed. 573. Butler *v.* Farnsworth, 4 Wash. C. C. 101; Cooper *v.* Galbraith, 3 Wash. C. C. 546. The residence of a corporation is where it exercises its franchise, engages in the prosecution of its corporate enterprise, and transacts its business. Bristol *v.* Chicago & A. R. Co., 15 Ill. 436; Day *v.* Newark I. R. Mfg. Co., 1 Blatckf. (Ind.) 628; Gill *v.* Kentucky & C. G. & S. Min. Co., 7 Bush (Ky.), 635; Baltimore & O. R. Co. *v.* Glenn, 28 Md. 287; New Orleans J. & G. N. R. Co. *v.* Wallace, 50 Miss. 244; Ormsby *v.* Vermont C. Min. Co., 56 N. Y. 623; Hubbard *v.* National Prot. Ins. Co., 11 How. (N. Y.) Pr. 149; Conroe *v.* National Prot. Co., 10 How. (N. Y.) Pr. 403; Glaize *v.* South Carolina R. Co., 1 Strobh. (S. C.) L. 70; Cowardin *v.* Universal L. Ins. Co. 32 Gratt. (Va.) 445; Louisville C. & C. R. Co. *v.* Letson, 43 U. S. (2 How.) 497; bk. 11, L. ed. 353; United States Bank *v.* McKenzie, 2 Brock C. C. 393; without regard to the citizenship of the individual composing it. Western Un. Tel. Co. *v.* Dickinson, 40 Ind. 444; Rosenfeld *v.* Adams Exp. Co., 21 La. An. 233; Oakey *v.* Bank, 14 La. An. 515; Stanley *v.* Chicago R. I. & P. R. Co., 62 Mo. 508; Quigley *v.* Central R. Co., 11 Nev. 350; Shaft *v.* Phœnix L. Ins. Co., 67 N. Y. 514; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1; Fargo *v.* McVicker, 38 How. (N. Y.) Pr. 1; Baltimore & O. R. R. Co. *v.* Cary, 28 Ohio St. 208; Shelby *v.* Hoffman, 7 Ohio St. 50; Ohio & M. R. R. Co. *v.* Wheeler, 66 U. S. (1 Black) 286; bk. 17, L. ed. 130; Bank of United States *v.* Devaux, 9 U. S. (5 Cr.) 57; bk. 3, L. ed. 38; Hope Ins. Co. *v.* Boardman, 9 U. S. (5 Cr.) 57; bk. 3, L. ed. 36; Covington Drawbridge Co. *v.* Shepherd, 61 U. S. (20 How.) 227; bk. 15, L. ed. 896; Lafayette Ins. Co. *v.* French, 59 U. S. (18 How.) 404; bk. 15, L. ed. 451; Marshall *v.* Baltimore & O. R. Co., 57 U. S. (16 How.) 314; bk. 14, L. ed. 953; Rundle *v.* Delaware & R. Can. Co., 55 U. S. (14 How.) 80; bk. 14, L. ed. 335; Louisville C. & C. R. Co. *v.* Letson 43 U. S. (2 How.) 497; bk. 11, L. ed, 353; Bank *v.* Slocomb, 39 U. S. (14 Pet.) 60; bk. 10, L. ed. 354; Chicago & N. W. R, Co. *v.* Whitton, 80 U. S. (13 Wall.) 270; bk. 20, L. ed. 571; Bonaparte *v.* Camden & A. R. Co., Bald. C. C. 205; Minnett *v.* Milwaukee & St. P. R. R. Co., 3 Dill. C. C. 460; Trust Farmers' L. Ins. Co. *v.* Maquillan, 3 Dill. C. C, 379; Greeley *v.* Smith, 32 Story C. C. 76; Barclay *v.* Com., 1 Woods C. C. 254; Wheedon *v.* Camden & A. R. R. Co., 4 Am. L. Reg. 216; Hatch *v.* Chicago R. I. & P. R. Co., 6 Blatchf. C. C. 105; Barney *v.* Globe Bank, 5 Blatchf. C. C. 107; Pomeroy *v.* New York & N. H. R. R. Co., 4 Blatchf. C. C. 120; Bliven *v.* New England Screw Co., 3 Blatchf. C. C. 111.

In those cases where a Federal court can take jurisdiction of controversy between citizens, it will take jurisdiction not alone of controversy between citizens and corporation or between corporations. See Kansas

Pac. R. Co. *v.* Atchison, T. & S. F. R. Co., 112 U. S. 414; bk. 28, L. ed. 794; Munner *v.* Daws, 94 U. S. 446; bk. 24 L. ed. 207; Chicago & N. W. R. Co. *v.* Whitton, 88 U. S. (13 Wall.) 270; bk. 20, L. ed. 571; United States Bank *v.* Deveaux, 9 U. S. (5 Cr.) 61; bk. 3 L. ed. 38; Fales Adm. *v.* Chicago M. & St. P. R. Co., 32 Fed. Rep. 673; Chicago N. W. R. Co. *v.* Chicago & St. P. R. Co., 6 Biss. C. C. 219; Parsons *v.* Greenville C. R. Co., 1 Hughes C. C. 279; Culbertson *v.* Wabash Nav. Co., 4 McL. C. C. 544; Nesmith *v.* Calvert, 1 Woodb. & M. C. C. 34; Vose *v.* Reed, 1 Wood's C. C. 647.

In the case of Fales *v.* Chicago M. & St. P. R. Co., 32 Fed. Rep. 673, it is said that the provisions of the act of congress of March 3, 1887, sec. 1, regarding the place of bringing suit by original process in the circuit courts of the United States, do not apply in determining the question of jurisdiction on an application for removal of causes from the state courts.

INDEX.

NOTE.—The mode of citing the American and English Railroad Cases is as follows:

35 Am. & Eng. R. R. Cas.

The index contains references to the decisions and to the notes. References to the decisions are to the pages upon which the cases begin. References to the notes are to the pages upon which the propositions stated in the index are found. Reference to Constitutional or Statutory Provisions are to the pages upon which they are cited.

ACCIDENT. See CROSSING.

ACT OF GOD. See CARRIER.

AGENT.

Farm crossing. Agreement for cattle pass. Under agreement of land-owner with agent negotiating sale of lands, *held*, that only obligation on part of company was to maintain cattle pass so long as trestle-bridge was in existence, and not to prevent them discontinuing use of such bridge. Canada Southern R. Co. *v.* Erwin (Can.). 311.

Farm crossing. Verbal agreement with agent for purchase of lands for construction of two under-crossings; evidence *held* to show that plaintiff relied upon law to secure him crossing, and not upon any contract, and that he could not therefore compel company to provide under-crossing. Canada Southern R. Co. *v.* Clouse (Can.). 296.

Obstruction of highway. Receiver: corporation in hands of, cannot be prosecuted criminally for obstruction of highway by receiver's servants or agents. State *v.* Wabash R. Co. (Ind.). 1.

Receiver. In running the road, a receiver represents or is the agent of the company. Bartlett *v.* Keims (N. J.). 15.

ANIMALS. See FENCES.

Appraisement. Cumulative remedy. Provision in Code for appraisement of stock killed or injured is merely cumulative and permissive, and compliance therewith is prerequisite to the institution of a suit to recover damages. Volkman *v.* Chicago, etc., R. Co. (Dak.). 204.

Attorney's fees. Class legislation. Statute authorizing taxing of an attorney's fee against the company, in event a judgment is recovered against it for killing stock through failure to fence, is unconstitutional and void. Wilder *v.* Chicago, etc., R. Co. (Mich.). 162.

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Contributory negligence as a defence in actions for killing stock. 155 *n.*

Contributory negligence. Carelessness of owner in permitting animals to run at large. 449 *n.*

Contributory negligence. Driving stock along track *held* to amount to such contributory negligence as would prevent recovery for stock killed while being so driven by the owner. Davidson *v.* Central Iowa R. Co. (Iowa). 158.

Contributory negligence. Duty of employees. If employees knew or ought to have known that cattle were upon track, and could have avoided injury after danger was discovered, contributory negligence of plaintiff in driving cattle upon track is immaterial, and does not affect company's liability. Wooster *v.* Chicago, etc., R. Co. (Iowa). 152.

Contributory negligence: person placing horse in enclosure securely fastened is not to be charged with, because horse escapes on track, unless horse was one that ordinary fence would not confine. Dennis *v.* Louisville, etc., R. Co. (Ind.) 141.

Contributory negligence. Situation of pasture. It is not contributory negligence *per se* to pasture cattle in an enclosed lot situated on both sides of the railroad, although the stock law is in force. Horner *v.* Williams (N. Car.). 155.

Contributory negligence: when immaterial. 154 *n.*

Crossing. Duty of company. Where killing of stock at public crossing is claimed to have been caused by reason of a defective crossing, instruction that it is the duty of the company to construct sufficient and safe crossings *held* not error. Atchison, etc., R. Co. *v.* Miller (Kan.). 190.

Crossing. Duty to give signal in absence of statute. 449 *n.*

Crossing. Evidence *held* to fail to show that cow was killed on road crossing as was claimed by the company, but was killed within right of way. Union Pac. R. Co. *v.* Blum (Neb.). 119.

Crossings: injuries to animals at. 121 *n.*

Crossing. Railroad company is bound to use ordinary care and diligence as to stock rightfully on highway. 449 *n.*

Crossing. Signal. Duty to signal for animals. 448 *n.*

Crossing. Signal: failure to give. Where cattle lawfully on highway are killed at crossing, evidence of omission to give signal before reaching crossing as required by statute is competent. Palmer *v.* St. Paul, etc., R. Co. (Minn.). 447.

Damages. Attorney's fee. Constitutionality of statute. 165 *n.*

Damages: measure of. 130 *n.*

Damages: measure of. If owner of ox killed could have used hide or meat, their value in estimating damages should be deducted from the value of the ox. Memphis, etc., R. Co. *v.* Hembree (Ala.). 128.

Damages. Value of animal after injury. 130 *n.*

Degree of care. If stock are observed upon track, employees in charge of train should exercise that care which prudent men ordinarily bestow on their business and conduct. Molair *v.* Port Royal, etc., R. Co. (S. Car.). 135.

Degree of care required when animals are observed on track. 140 *n.*

Depot grounds. Burden of proof. If company pleads in defence that stock entered on track within depot grounds, it has the burden of proof to establish that fact. Wilder *v.* Chicago, etc., R. Co. (Mich.). 162.

Duty of engineer. 151 *n.*

Evidence. Condition of culvert. If it appears that stock were killed on a culvert, cross-ties of which were afterwards found to be pushed together, jury cannot consider condition of culvert before accident. Molair *v.* Port Royal, etc., R. Co. (S. Car.). 135.

Evidence. Corporate existence. On appeal from justice's court in action for killing stock, it is not necessary for plaintiff to prove that railway company is a corporation to entitle him to recover. Kansas City, etc., R. Co. *v.* Bolson (Kan.). 144.

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Evidence. Documents in another state. In action for killing stock, if plaintiff's claim be in possession of person in another state, and not under control of party wishing to introduce it, secondary evidence may be admitted to prove its contents. Memphis, etc., R. Co. *v.* Hembree (Ala.). 128.

Evidence in action for killing stock. 122 *n.*

Evidence: sufficiency of, in action for injury to stock. 140 *n.*

Leaving track. Presumption. If animal is seen upon track by engineer, there is no presumption that it will step from track in time to avoid injury. Dennis *v.* Louisville, etc., R. Co. (Ind.). 141.

Limitation of action. In absence of evidence showing manner in which company in possession of road acquired title, *held* that it must be presumed that it was operating the road under the charter of the company by which it was constructed, which contained no special limitation of actions against it. Kentucky Cent. R. Co. *v.* Kinney (Ky.). 199.

Negligence. Sufficiency of evidence. Fact that place where stock was killed was at point where trainmen could have seen them in time to have stopped train, and fact that train was moving faster than regular schedule time, *held* not sufficient to establish negligence to entitle recovery. Kansas City, etc., R. Co. *v.* Bolson (Kan.). 144.

Pleading and proof. Variance. Although a petition alleges that stock was injured in March, fact that evidence shows that animal was injured in August is immaterial. Texas, etc., R. Co. *v.* Virginia, etc., Co. (Tex.), 201.

Presumption of negligence in actions for killing stock. 206 *n.*

Private crossing. If landowner takes advantage of statute which authorizes him to construct crossing, and imposes upon him duty of maintaining gates, railroad in absence of negligence is not liable for killing cattle at such crossing, even though cattle belonged to third person. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

Running at large. Construction of Iowa statute. 133 *n.*

"Running at large." Horse driven across depot grounds is not running at large within meaning of statute giving right to recover for stock killed while running at large at point where right to fence exists. Johnson *v.* Chicago, etc., R. Co. (Iowa). 131.

Signals of owner pursuing horse which had escaped on track. Company is not liable for killing of horse if train employees did not see animal, and signals of owner did not give warning that injury would result if train was not stopped. Dennis *v.* Louisville, etc., R. Co. (Ind.). 141.

Speed as evidence of negligence in action for killing stock. 147 *n.*

Speed of train. No recovery can be had although train which killed horse driven across depot grounds was travelling at greater speed than eight miles an hour, operation of statute being confined to stock running at large. Johnson *v.* Chicago, etc., R. Co. (Iowa). 131.

Starting train. Frightening horses on right of way. While horses were being driven along right of way to farm crossing at which they had escaped, train apparently drew up for a time and proceeded again after sounding the whistle, horses were frightened, and ran on bridge and were injured, *held*, that the company was not liable. Hurd *v.* Grand Trunk R. Co. (Ont.). 450.

Statutory presumption. Directing verdict. Although plaintiff may have established a *prima facie* case within meaning of statute by showing killing of stock, court should direct a verdict for the defendant if its testimony shows that the killing took place without fault on the part of its employees. Volkman *v.* Chicago, etc., R. Co. (Dak.). 204.

Stock law. Evidence of doctrine. Although animals killed were not running at large, evidence that stock law had been adopted by the company is admissible to show degree of vigilance required. Molair *v.* Port Royal, etc., R. Co. (S. Car.). 135.

Stock law: less care required after passage of. 140 *n.*

ANIMALS—*Continued.*

Train employees are not under duty to owner to see animals wandering on track securely protected. Dennis *v.* Louisville, etc., R. Co. (Ind.). 141.
Unavoidable accident. If cow sprang on track about 50 yards ahead of train and was not seen before that time, and when discovered all the known appliances could not have stopped train in time to save her, such circumstances constitute complete defence. Alabama, etc., R. Co. *v.* Smith (Ala.). 150.
Unavoidable injury: company is not liable for. 151 *n.*
Value. Opinion evidence. In action for injury to stock, witnesses who have had experience in the business for which animals are used can competently testify as to their value. Texas, etc., R. Co. *v.* Virginia, etc., Co. (Tex.). 201.

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sponsibility when such exemption is not just and reasonable in the eye of the law." Hart *v.* Railroad Co., 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604, was an action like this. In that case the property received for shipment was five horses, and the extent of the carrier's liability agreed upon for each horse was $200. By the negligence of the carrier one of the horses was killed, and the others were injured. The plaintiff proved the horses were race-horses, and offered to show damages, based on their value, amounting to over $25,000. The testimony was excluded, and he had verdict for $1,200. On writ of error brought by him, it was held that the evidence was not admissible; that the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; and that the terms of the limitation covered a loss through negligence. Mr. Justice Blatchford, speaking for the court, said: "This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and when there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." Railroad Co. *v.* Henlein, 52 Ala. 606, was an action against a carrier on a contract to

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Highway crossing. Fact that road has once been constructed at grade does not exempt it from bridging when that becomes necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

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Highway crossing. *Mandamus.* Where *mandamus* proceedings were pending against two companies to compel them to bridge their tracks, and the roads were near together, so that bridges should be made continuous over all the tracks, *held*, not error to require both causes to be tried together. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

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Connecting lines. Construction of statute. Section of Georgia Code relating to responsibility of connecting roads where goods are transported over more than one of them, *held* to have no application unless declaration alleges that defendant received goods from its connecting line in good order, and there being no such allegation defendant might show that damage was done before it received the freight. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602.

Connecting lines. Contract to ship to destination shown by company receiving cotton destined to point beyond its own line without limiting its liability; and connecting carriers having no contract with plaintiff are not liable to him. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Connecting lines. Custody of goods. Delay. Despatch company having contracted to carry butter from Ontario to England, *held* to have made through contract of carriage, and to be liable to the shipper for damages sustained owing to delay in getting the butter aboard the steamship. Merchant's Despatch Trans. Co. *v.* Hately (Can.). 565.

Connecting lines. Defective cars. 664 *n.*

Connecting lines. Delay. Letters from agents. Railroad cannot introduce letters written to its agents by agents of connecting road regarding mistake in transporting freight received from such road causing delay. Waite *v.* New York, etc., R. Co. (N. Y.). 576.

Connecting lines: delivery to. Custom. Fact that company receiving cotton, put car on side road of defendant company according to custom and agreement existing between them, and defendant's agent reported car to accountant, does not raise presumption that defendant accepted car as carrier. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Connecting lines. Duty to receive freight and passengers from other roads. Strike of employees. 650 *n.*

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Connecting lines. Exchange of cars. Receiver is obliged to receive and transport freight cars and furnish accommodations to connecting lines to same extent as proper officers of railroad companies. Biers *v.* Wabash, etc., R. Co. (C. C.). 646.

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Connecting lines. Injury to freight. Company sued for injury to through freight cannot defend on ground that it was not last road receiving goods where it was last road mentioned in through bill and received amount of freight from consignee. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602

Connecting lines. Liability to consignor. One company receiving freight from another is liable directly to consignor for any breach of contract between him and its connecting line, and is entitled to benefit of any exemption of liability. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Connecting lines. Loss of goods. 662 *n.*

Connecting lines: responsibility of carriers for negligence of. 663 *n.*

Connecting lines: wrongful delivery by. 664 *n.*

Contract of carriage: suit on. 672 *n.*

Delay. Damages. Consignee cannot recover damages for delay in the delivery of merchandise caused by depreciation in price, unless he shows that proceeds of consignment were less than purchase price. Haas *v.* Kansas City, etc., R. Co. (Ga.). 572.

Delay. Damages. Sale at fixed price. 575 *n.*

Delay. Evidence. Delays of connecting roads. 656 *n.*

Delay in delivery. Strike. Railroad is not liable for delay in delivering freight caused by strike of employees accompanied by violence which could not be suppressed. Haas *v.* Kansas City, etc., R. Co. (Ga.). 572.

Delay in transporting. 571 *n.* 579 *n.*

Delay in transporting freight caused by unusual press of business. 655 *n.*

Delay. Machinery shipped for special purposes. 579 *n.*

Delay. Measure of damages. 575 *n.*

Delay. Neglect to forward goods. 571 *n.*

Delay. Negligence. Company receiving car from connecting line containing through freight, and also boiler way-billed to point on its line, *held* guilty of negligence in sending such car beyond its line to destination of through freight without opening it to look for boiler. Waite *v.* New York, etc., R. Co. (N. Y.). 576.

Delay. Pleading. Evidence. In action for delay, if complaint states that delay was caused by negligence and answer denies negligence, and proof goes largely to question of negligence, exclusion from jury of question of express contract, and submitting case wholly on charge of negligence, cannot be objected to by defendant. Waite *v.* New York etc., R. Co. (N.Y.). 576.

Delay. Season of shipment. Evidence of conversation at time of contract. 656 *n.*

Delay. Strike. Riot and mob. 575 *n.*

Delay. Suit by consignee. Where contract of carriage is made with consignor consignee cannot sue for delay unless consignor has assigned to him bill of lading. Haas *v.* Kansas City, etc., R. Co. (Ga.). 572.

Delivery of goods. Custom. Fact that railroad had previously delivered freight shipped to order of consignor to third party before acceptance of draft, such draft, however, having always been paid, will not justify finding that there was course of dealing which would take the case out of the rule as to proper delivery. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Delivery of goods. Where goods are shipped to order of consignor railroad is not justified in delivering them to third person without bill of lading, and merely on production of invoice and letter giving him notice of draft. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Delivery without bill of lading. Usage. Railroad delivering cattle consigned to shipper to party whom it is directed merely to notify, *held* liable to bank discounting consignor's draft to such person. Fact that it was customary to so deliver shipments between same parties *held* no defence. Northern Pennsylvania R. Co. *v.* Commercial Bank (U. S.). 556.

Delivery of goods without presenting bill of lading. Custom. 554 *n.*

charge of these duties of a common carrier which they undertook to perform, and confined its duties, by the Memphis contract, to the furnishing suitable cars, and hauling them to the place of destination. Having the care of the stock, the liabilities of a common carrier which make it his duty to account for the loss of freight did not devolve on appellant. Being in charge, they were presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause before they can be entitled to recover. Railroad Co. *v.* Hedger, 9 Bush, 645, 651; Clark *v.* Railway Co., 64 Mo. 441, 448; Harvey *v.* Rose, 26 Ark. 3; Railway Co. *v.* Reynolds, 8 Kan. 623, 641.

For the errors indicated, the judgment of the court below is reversed, and the cause is remanded for a new trial.

Carriers Limiting Liability by Contract.—See, *ante*, Block *v.* Merchants' Despatch Transportation Co., 579, note, 601.

Same—Connecting Lines—Agreements Between.—See, *ante*, Palmer *v.* Chicago, Burlington & Quincy R. Co., 629, note, 635.

Limitation of Liability to Certain Amount.—See, *ante*, Block *v.* Merchants' Despatch Transportation Co., 579, and note, 601.

When Contract Limiting Liability Insures to Benefit a Connecting Line.—Burroughs *v.* Grand Trunk R. Co., 32 Am. & Eng. R. R. Cas. 467, note 474.

BIERS *et al.*

v.

WABASH, ST. LOUIS AND PACIFIC R. CO. (Chicago, Burlington & Quincy R. Co., Intervenor.)

(*United States Circuit Court, N. D. Illinois, March* 14, 1888.)

Common Carriers—Connecting Lines—Boycotts.—A railroad doing business as a common carrier has no right to refuse to deliver to, or receive from, a connecting railroad, cars of such connecting line, either loaded or empty, or freight of any kind which is ordinarily transported between railroad companies according to the proper and usual course of business; and it is no excuse for the action of a railroad company in so refusing cars or freight properly offered that the receiving of them might or probably would involve the company in a strike and boycott of employees, which exists on and against the road from which it so refuses to receive the cars or freight.

Same—Receiver—Duty to Receive.—The receiver of a railroad company who controls its operation is no less a common carrier because the property of the road is in the custody of the court; and as such carrier he is obliged to receive and transport cars and freight, and to furnish accommo-

CARRIERS—*Continued.*

contents, it having been executed in duplicate, one copy of which he retained, in absence of fraud by carrier, will not vitiate limitation after contract has been acted upon. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Limiting liability. Despatch company. Transportation company cannot limit its liability by requiring that owner shall look to railroad over which property is shipped. Despatch company is common carrier, and railroad over whose line it ships its freight is but its agent. Block *v.* Merchants' Despatch Co. (Tenn.). 579.

Limiting liability. Express companies. 496 *n.*

Limiting liability. How far carriers may limit their common-law liability by contract. 677 *n.*

Limiting liability. *Lex loci contractus.* Contract limiting liability for transportation of goods into Georgia from another state will be held valid by Georgia courts if it is lawful where it is made, although it would be void if made in Georgia. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602.

Limiting liability. Shipments of live stock. Reduced rates. 614 *n.*

Limiting liability. Specific sum. Stipulation that measure of damages for loss or injury to live stock should not exceed $50 per head when based upon consideration of reduction in rates maintained. St. Louis, etc., R. Co, *v.* Weakly (Ark.). 635.

Limiting liability. Stipulation as to damages. Carrier has no right to require, as condition precedent to receiving live stock, agreement that in case of loss, measure of damages shall not exceed cash value at place of shipment. Missouri Pac. R. Co. *v.* Fagan (Tex.) 666.

Limiting liability. Stipulation for notice. 678 *n.*

Limiting liability to specified sum. Company may stipulate for limitation to specified sum in case of total loss in consideration of deduction from regular rates. Louisville, etc., R. Co. *v.* Sherrod (Ala.). 611.

Limiting liability. Warehouseman. Evidence. Receipt in contract limiting liability of carrier *held* immaterial in action by owner to recover value of goods destroyed by fire after they arrived at destination and were permitted to remain until carrier became liable only as warehouseman. Union Pac. R. Co. *v.* Moyer (Kan.). 615.

Live stock. Act of God. Company which has agreed to transport cattle on certain day cannot plead act of God which takes place after such day as defence to action for damages for breach of contract. Gulf, etc., R. Co. *v.* McCorquodale (Tex.). 653.

Live stock: carriers of. Who are. Company engaged in business of transporting live stock holding itself out as such is a common carrier of live stock, with such limitations of its common-law liabilities as arise from habits, wants, vices, etc., of animals. Ayres *v.* Chicago, etc., R. Co. (Wis.). 679.

Live stock. Contributory negligence. Action for damages for injury to horse while being unloaded. What is considered as plea of contributory negligence requiring reply. Owen *v.* Louisville & N. R. Co. (Ky.). 687.

Live stock. Custom. Evidence to prove custom among railroads not to receive stock unless shipper agrees to hold company harmless for delays in taking up freight is incompetent. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Live stock. Damages. Where plaintiff's evidence showed contract of shipment to have been in writing, objections to questions asked him on cross-examination as to his agreement to provide for stock *held* properly sustained. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Live stock. Defective apparatus. Contributory negligence. Carrier must furnish safe means of unloading. Contributory negligence of owner having knowledge of unsafe platform, question for jury. Owen *v.* Louisville, etc., R. Co. (Ky.). 687.

into effective force against the petitioner over all its system, and all intercourse or exchange of cars between it and other connecting railroads, including the lines in the custody of this court; that P. M. Arthur, as the chief executive officer of the Brotherhood, has been in Chicago for 10 days, giving aid and directions to the members of the Brotherhood; and for the purpose of injuring the petitioner's business, and rendering it impossible for it to discharge its duties as a carrier, he has issued instructions to the members of the Brotherhood employed by the receiver not to allow their engines to be used in hauling cars going to or coming from the petitioner's line of railroad; and that the action of the receiver and his subordinates, in refusing to exchange loaded freight cars with the petitioner, was the result of moral duress thus created by the Brotherhood, including the engineers in the receiver's service. The prayer of the petition is that a peremtory order be issued directing and requiring the receiver and his subordinates to interchange business with the petitioner according to usage; and to abstain from the declared policy of non-intercourse with the petitioner; also that the Brotherhood of Locomotive Engineers, its officers, agents, and committees, be enjoined from issuing any orders or instructions to any of the engineers in the service of the receiver as to what cars they shall haul over the Wabash tracks, and that such association and its officers, and especially P. M. Arthur, be required to show cause why they should not be punished for contempt in interfering with the property in the custody of the court.

The receiver's answer admits the existence of the usage of interchanging loaded cars between himself and the petitioner, but avers that such interchange has been small; the receiver's receipts therefrom during the month of January being less than $500. The answer avers that the petitioner owns and operates a system of railways occupying much of the territory tributary to the lines of the Wabash Company, and that the two systems are directly competitive at many important points. The answer admits that the receiver's agents declined to receive and haul the eight cars tendered as stated in the petition; but avers that at the time of such tender and refusal the receiver had issued no orders, and given no instructions whatever to his agents or employees, with respect to the interchange of business with the petitioner; but admits that on the day following such tender and refusal the receiver issued instructions to his agents to receive no cars of the petitioner for the present, but to transfer from the cars of the petitioner all freight tendered to the Wabash, and to take no freight originating on the petitioner's system, except as local freight. These instructions were issued, the answer avers, because there was danger that a continuance of interchange of

Receiver's answer.

CARRIERS—*Continued.*

if shortage in package was not discovered until after prescribed time, condition will not preclude recovery. Glenn *v.* Southern Ex. Co. (Tenn.). 627.

Machinery. Open cars. Where shipper agrees that machinery may be transferred on open cars, company is not liable for damage caused thereby in absence of its own negligence or unreasonable delay. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602.

Mail. Carriage of U. S. mail. 511 *n.*

Mail: contract for carrying. United States statute giving Postmaster-General authority to deduct from pay of contractors price of trip where trip is not made, and not to exceed three times price of trip where failure is caused by fault of contractor, *held* not repealed. Chicago, etc., R. Co. *v.* United States (U. S.). 508.

Notice of claim for loss. Condition requiring shipper to give notice of claim to agent before removal of stock, cannot be shown to exist as to custom, it not being reasonable to require such notice where company has no agent at point of shipment upon whom notice can be served. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Rates. Charter contract. Charter of Georgia R. & B. Co. *held* not a contract between state and railroad that latter might charge whatever it choosed within certain prescribed limits, and company is subject to provisions of subsequent legislation providing for commissioners to regulate railroad tariffs. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Rates: charter restriction against regulation of. 518 *n.*

Rates. Constitutional law. State may prescribe rates to be charged by railroad company in absence of charter provision forbidding it, subject to limitation that carriage is not required without reward, or on conditions amounting to taking property without compensation, and that what is done does not amount to regulation of commerce. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Rates. Excessive charges. Provision in statute requiring commissioners to enter complaint in court of equity where its orders have been violated or neglected, *held* not to authorize such proceedings in order to enforce repayment of freight charges claimed to have been unreasonable. Board of R. Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Rates. Jurisdiction of railroad commissioners. Act creating railroad commissioners did not give board authority to adjust differences between railroad companies and shippers, although it was empowered to hear complaints. Board of Railroad Commrs. *v* Oregon R. & N. Co. (Ore.). 542.

Rates: power of legislature to regulate. 518 *n.*

Receiver: liability of, as common carrier. 8 *n.*

Receiver. Loss of goods. Goods lost in transit while road is operated by receiver not being carried under an undertaking by the corporation, the negligence causing the loss is not the negligence of the corporation, and an action will not lie against it. Kansas Pacific R. Co. *v.* Searle (Col.). 6.

Receiver of railroad company who controls its operation is no less common carrier because property of road is in custody of court. Biers *v.* Wabash, etc., R. Co. (C. C.). 646.

Refusal to carry. 528 *n.*

Refusal to carry. Exemplary damages: railroad is liable for, for refusal to carry goods, only in case of ill-will or malicious disregard for rights of another. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

Refusal to carry. Instruction that if railroad after refusing to carry for plaintiff carried for others freight that was received and discharged at private platform, plaintiff cannot recover, properly refused, as it presumes that position of carrier had been established, which is question for jury. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

Refused to carry. "Regular station." Place where there has never been any agent but, where trains sometimes stop, *held* not "regular station" within meaning of North Carolina Code imposing penalty for refusing to receive

CARRIERS—*Continued.*

freight at any regular depot, station, wharf, etc. Kellogg *v.* Suffolk, etc., R. Co. (N. Car.). 529.
Valuation. Loss of goods. Statement made by shipper as to value. 624 *n.*
Who are. Branch roads. Instruction that if railroad company operated branch road, whether it had a right to construct it or not, it will become a common carrier thereon, *held* erroneous. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Branch roads. Question whether branch road constructed by railroad company has been used for general transportation so as to make company liable as carrier as to such branch is one of fact for jury. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Branch roads. Where railroad company is invested with power to construct branches, it will become a carrier as to such branches. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Cabmen, draymen, and porters. 495 *n.*
Who are. Common carrier is one who undertakes as a business for hire or reward to carry from one place to another for all who apply. Schloss *v.* Wood (Colo.). 492.
Who are. Evidence. Whether person is common carrier depends on whether he holds himself out as such. By engaging in business generally or by announcing it by advertising, etc., person may fix upon himself the liability of a common carrier. Schloss *v.* Wood (Colo.). 492.
Who are. Express companies. 496 *n.*
Who are. Ferrymen. 496 *n.*
Who are. Omnibus proprietors. 496 *n.*
Who are. Owners of steamboats, ships, vessels, canal-boats and tow-boats. 496 *n.*
Who are. Province of jury. Where parties receive merchandise at terminus of railroad and transport it to neighboring town, where they had office and where bills were collected, etc., *held*, a question for jury whether they were common carriers. Schloss *v.* Wood (Colo.). 492.
Who are. Question for jury. Question as to whether party is a common carrier is one of fact, and consequently for jury. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Railroad companies. 497 *n.*
Who are. Railroad is a common carrier, and is bound to carry for all persons all goods offered for transportation. Avinger *v.* South Carolina R. Co. (S. Car.) 519.
Who are. Stage-coach lines. 497 *n.*
Who are. Street railways. 497 *n.*
Who are. Telephone companies. 497 *n.*
Who are. Transportation companies. 498 *n.*
Who are. Wagoners. 498 *n.*

CATTLE GUARDS. See FENCES.

CHARTER. See CARRIERS; CONSTITUTIONAL LAW.

CHILDREN. See PARENT AND CHILD.

Contributory negligence. Capacity and degree of care; when a question for jury. 396 *n.*
Contributory negligence. Children so young as to be *non sui juris*. 395 *n.*
Contributory negligence. Child seven years of age or upwards is supposed to be capable of taking care of himself. 395 *n.*
Contributory negligence. Instruction. Where boy of eleven years was killed at crossing, instruction that jury should consider boy's age and discretion

CHILDREN—*Continued.*

held erroneous and misleading. Erwin *v.* St. Louis, etc., R. Co. (Mo.). 390.

Contributory negligence of infants, 394 *n.*

Contributory negligence. Question of care to be required of a child is for jury. 395 *n.*

Contributory negligence. Whether children are *non sui juris*. When a matter of law. 395 *n.*

Infant plaintiffs. Next friend. The husband of their mother has no interest in suit by infant plaintiffs to recover for killing their father, and he may act in such suit as next friend. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Interest in deceased's life. Under South Carolina statute children of person killed may maintain action although at date of the killing all of the plaintiffs were adults, having no legal claim on deceased for support. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

CITIZENSHIP. See UNITED STATES COURTS.

Citizenship of corporations. 700 *n.*

Jurisdiction of federal courts. 701 *n.*

Jurisdiction of federal courts: for purposes of determining, corporation is citizen of state which created it and where its chief office is. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

Jurisdiction of federal court over railroad does not depend on diverse citizenship of party. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

COASTING. See CROSSINGS.

COLLISION.

Collision at railroad crossing. Duty of engineer. 285 *n.*

Condition of engineer. In action for injuries to car by collision at railroad crossing it may be shown that defendant's engineer had been drinking. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Crossing Breach of contract. Action by company against another to recover damages for collision at crossing may be maintained under contract by which defendant company was to maintain crossing, and collision was caused by servants of defendant failing to obey signal. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Crossing. Damages. Evidence. In action for injury to car by collision at railroad crossing, testimony as to cost of repairing car and difference in value before and after injury is competent. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

COMMISSIONERS. See RAILROAD COMMISSIONERS.

CONFESSION OF JUDGMENT. See JUDGMENT.

CONSTITUTIONAL LAW.

Attorney's fee. Class legislation. Statute authorizing taxing of an attorney's fee against the company in event a judgment is recovered against it for killing stock through failure to fence, is unconstitutional and void. Wilder *v.* Chicago, etc., R. Co. (Mich.). 162.

Carriers. Charter contract. Charter of Georgia R. & B. Co. *held* not a contract between state and railroad that latter might charge whatever it choosed within certain prescribed limits, and company is subject to provisions of subsequent legislation providing for commissioners to regulate railroad tariffs. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

CONSTITUTIONAL LAW—*Continued.*

Carriers. Rates. State may prescribe rates to be charged by railroad in absence of charter provision prohibiting it, subject to limitation that carriage is not required without reward, and that what is done does not amount to regulation of foreign or interstate commerce. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Charter restriction against regulation of rates. 518 *n.*

Citizenship. Corporations have no absolute right to recognition in any state save that where it was created. Term "citizen" in constitution does not include corporation. Woodward *v.* Commonwealth (Ky.). 498.

Corporations. Personality. 507 *n.*

Crossing. Public benefit. Statute requiring company to make crossing outside of any enclosure on demand of any two citizens, *held* unconstitutional. Gulf, etc., R. Co. *v.* Ellis (Tex.). 292.

Express companies. License. Kentucky act requiring foreign express companies to procure license is not in violation of federal constitution. Woodward *v.* Commonwealth (Ky.). 498.

Farm crossing. Statute requiring railroads to make farm crossing is unconstitutional in so far as it applies to companies which secured their right of way before its enactment. Gulf, etc., R. Co. *v.* Rowland (Tex.). 286.

Legislative control. When exempt. In order to exempt corporations from legislative control, exemption must appear clearly and unmistakably. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Private corporations. Obligation of contract. Railroad company is private corporation, and a contract embodied in its charter is within constitutional clause prohibiting impairment of obligation of contract. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Public use. Legislative control. When property is affected with a public use business is subject to public control for convenience and security of public, and to prevent unreasonable charges, and favoritism by unjust discrimination. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Railroad depots. Regulation by statute. 465 *n.*

Rates; power of legislature to regulate. 518 *n.*

Residence and citizenship of corporation. 507 *n.*

Title of act. Constitutionality. Statute providing that all gates at farm crossings shall, in the absence of an agreement, be constructed, etc., by landowner, may be inserted in statute entitled "An act requiring railroad corporations to fence their right of way," etc. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

CONSTRUCTION.

Filing map. Right of company. When company has as required by General Railroad Act, filed map and survey of land and given required notice, it has acquired right to construct its road upon such line in nature of lien upon the land, which is exclusive as to all other companies and free from interference. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

CONTRACTORS. See MAIL.

CONTRACTS. See RECEIVER.

CONTRIBUTION.

Doctrine of contribution stated. Application where one company meets entire expense of constructing crossing where its track crosses that of another company. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

CONTRIBUTORY NEGLIGENCE. See ANIMALS; CHILDREN; FIRES.

Liability notwithstanding. Although party injured is negligent, company is still liable if by exercise of ordinary care after discovery of danger accident

CONTRIBUTORY NEGLIGENCE—*Continued.*

could have been prevented, or, if company failed to discover danger when the exercise of ordinary care would have discovered it. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Liability notwithstanding. Party injured at crossing is entitled to recover notwithstanding want of ordinary care on his part if those in charge of train could by exercise of ordinary care have avoided injuring him. Louisville, etc., R. Co. *v.* Schuster (Ky.). 407.

Nonsuit. Contributory negligence being matter of defence which, must be proved to satisfaction of jury; it cannot constitute ground for nonsuit. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Province of court. According to rule in Texas, it is not error for court to omit to instruct that it was plaintiffs' duty as they approached crossing to look and listen for trains if charge as to contributory negligence has been given in general terms. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

CORONER'S INQUEST. See EVIDENCE.

CORPORATIONS. See CITIZENSHIP; PLEADING AND PRACTICE.

Constitutional law. Citizenship. Corporation has no absolute right to recognition in any State, save that where it was created. Term "citizen" in constitution does not include corporations. Woodward *v.* Commonwealth (Ky.). 498.

Corporate existence. On appeal from justice's court in action for killing stock it is not necessary for plaintiff to prove that railway company is a corporation to entitle him to recover. Kansas City, etc., R. Co. *v.* Bolson (Kan.). 144.

Personality of corporations. 507 *n.*

Private corporation. Obligation of contract. Railroad company is a private corporation though its uses are public, and contract embodied in charter is within constitutional clause prohibiting impairment of contract. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Residence and citizenship. 507 *n.*

Residence and citizenship of corporations. In federal courts. 507 *n.*

Sale of road. By railroad-incorporation law of Texas there is no authority conferred upon railroads to sell their tracks nor to purchase track of another company. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

Transfer of property. Railroad cannot so dispose of its track and property as to incapacitate itself from fulfilling its duties to the public except express power has been conferred upon it. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

CRIMINAL LAW.

Obstruction of highway. Receiver. Corporation in hands of receiver cannot be prosecuted criminally for obstruction of highway by receiver's servants or agents. State *v.* Wabash R. Co. (Ind.). 1.

CROSSING.

CONSTRUCTION OF CROSSING AND RESTORATION OF STREET.

Alteration of track. Power of court to require lateral change in location of tracks long before laid on public streets should not be exercised unless reasonably necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Approaches to crossing: duty of company as to. 261 *n.*

Bridges and footways: duty to construct. 261 *n.*

Bridge over highway. *Mandamus.* Manner in which duty of restoring streets should be performed after building bridge over tracks and approaches thereto. Mandate of court may properly be specific in that regard. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

CROSSING—*Continued.*

Bridge over highway. Necessity of works by another company *held* not a fatal objection to *mandamus* proceedings against defendant. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridge over street. *Mandamus.* Where *mandamus* proceedings were pending against two railroad companies to compel them to bridge their tracks, and the roads were near together so that bridges should be made continuous over all the tracks, *held* not error to require both causes to be tried together. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridge over street. Necessity. In view of necessity that bridges be built over tracks of two railroads if over either, evidence, *held* admissible as to extent of use of crossing by the other company showing necessity for bridge. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridges over streets. Statute. Special act authorizing company to construct branch lines and requiring city to build approaches to street bridges construed as not applicable. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridging street. Cost. Apportionment. In proceedings against two companies to compel construction of bridge over tracks, each company was properly required to construct those parts above their own tracks and approaches upon their sides without other apportionment. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Change of highway. 262 *n.*

Constitutionality of statute. Public benefit. Statute requiring company to make crossing outside of any enclosure on demand of any two citizens *held* unconstitutional. Gulf, etc., R. Co. *v.* Ellis (Tex.). 292.

Construction of crossing. Negligence. 263 *n.*

Duty of company to make crossing. 260 *n.*

Grade crossing. Bridge. Fact that road has once been constructed at grade does not exempt it from bridging when that becomes necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Grade crossing. Construction. Statute relating to highway crossings construed as intended to provide how grade crossing should be constructed, but not as authorizing all crossings to be at grade. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Grade crossing. Revocation of Contract. 262 *n.*

Lessee: duty of. 262 *n.*

Receiver: liability of, for negligence in constructing crossing. 262 *n.*

Restoration of street. Charter of company construed as imposing continuous duty as to restoring public streets by bridging or otherwise when necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Restoration of street. *Mandamus* proceedings may be prosecuted to determine mode in which street should be restored and to compel performance although city council has not yet changed established grade. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Sufficiency of crossing. Statutory requirements. 262 *n.*

FARM CROSSING.

Acquiring easement by prescription. 320 *n.*

Agreement for cattle pass. Under agreement of land owner with agent negotiating sale of lands, *held* that only obligation on part of company was to maintain cattle pass so long as trestle bridge was in existence, and not to prevent them discontinuing use of such bridge. Canada Southern R. Co. *v.* Erwin (Can.). 311.

Agreement for farm crossings. 314 *n.*

Agreement with agent for purchase of lands, verbally, for construction of two under-crossings. Evidence *held* to show that plaintiff relied upon law to secure him crossing, and not upon any contract, and that he could not therefore compel company to provide under-crossing. Canada Southern R. Co. *v.* Clouse (Can.). 296.

CROSSING—*Continued.*

Constitutionality of statute. Compensation. Statute requiring railroads to make farm crossing is unconstitutional in so far as it applies to companies which secured their right of way before its enactment. Gulf, etc., R. Co. *v.* Rowland (Tex.). 286.

Constitutionality of statute. Public benefit. Statute requiring company to make crossing outside of any enclosure on demand of any two citizens *held* unconstitutional. Gulf, etc., R. Co. *v.* Ellis (Tex.). 292.

Duty to provide. Company *held* bound to provide such farm crossings as might be necessary, nature and number of such crossings to be determined on reference to master. Canada Southern R. Co. *v.* Clouse (Can.). 296.

Easement. Acquisition by prescription. Proprietor of lands may by open and uninterrupted use for more than 20 years acquire right by prescription although statute prohibits travelling upon crossing of railroad without consent of company. Turner *v.* Fitchburg R. Co. (Mass.). 317.

Easement. Prescription. Plaintiff using sub-way under trestle for more than 20 years *held* entitled to assume that there was a reservation in the deed from the original grantor of the right of way which was lost, or he was entitled to claim easement under the Prescription Act. Wells *v.* Northern R. Co. (Ont.). 314.

Fence. Land-owner taking advantage of statute authorizing him to construct crossing, but imposes upon him duty of maintaining gates, railroad is not, in absence of negligence, liable for injuring cattle there, even though cattle belonged to third party. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

Fence. Liability of company. 184 *n.*

Fences. Where statute authorizes land-owner to construct crossing, but imposes upon him duty of maintaining gates, the companies are not liable for injuring cattle at such crossing, even though cattle belonged to third person. Pennsylvania Company *v.* Spaulding (Ind.). 184.

Gate. Company erecting gate and constructing private crossing is under no obligation either by statute or implied contract to keep gate in repair or closed. Evansville, etc., R. Co. *v.* Mosier (Ind.). 196.

Gates; when allowed at. 118 *n.*

Sub-way. Easement. Prescription. Where sub-way was left under trestle bridge which land-owner had used since 1862, *held*, that though plaintiff could not prevent filling of sub-way he was entitled to damages for his property in the easement. Wells *v.* Northern R. Co. (Ont.). 314.

CROSSING OF TWO ROADS.

Collision at railroad crossing. Duty of engineer. 285 *n.*

Collision. Breach of contract. Action by one company against another to recover damages for collision at crossing may be maintained under contract by which defendant company was to maintain crossing, and collision on was caused by servants of defendant failing to obey signal. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Collision. Breach of contract. Where agreement regulating use of crossing has been made employees on train having right of way are not bound to anticipate any breach of agreement. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Collision. Condition of engineer. In actton for injuries to car by collision at railroad crossing it may be shown that defendant's engineer had been drinking. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Collision. Damages. Evidence. In action for injuries to car, testimony as to cost of taking up and repairing car and as to difference in value of car before and after injury is competent. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Construction of road. Nature of Crossing. 267 *n.*

Crossing of two roads. Repairs. Expenses. Lessee company while operating road receives benefit resulting from safe crossing and services of

CROSSING—*Continued.*

watchman, and takes them subject to burden of expense as provided by statute. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Grade crossing. Injunction. Fact that one company had, pending proceedings to enjoin grade crossing, constructed works at cost of $6,000, which would become useless if under-crossing were decreed, *held* not sufficient reason for refusal of injunction. Humeston *v.* Chicago, etc., R. Co. (Iowa). 263.

Grade crossing. Injunction granted restraining one company from constructing grade crossing over track of another where track of plaintiff was constructed upon heavy grade, and there was statute authorizing company to carry road across or under any other railway. Humeston *v.* Chicago, etc., R. Co. (Iowa.) 263.

Grade crossings. Necessity. Injunction. 267 *n.*

Joint obligation. Apportionment of expense. Under Ohio statute burden of maintaining crossing of two roads is common to both companies, and where either pays whole expense, it is entitled to recover from the other equal proportion thereof. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Lessee. Owner of track. Company having possession of road as lessee is one "owning track" within meaning of statute, which provides that crossing shall be maintained at joint expense of companies owning tracks. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Location of road. Injunction. Where company has filed map it may obtain injunction against another road attempting by construction of road upon or crossing its intended route to interfere. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

Rights of crossing a railroad are secondary to those of that crossed. 267 *n.*

Right to construct railroad crossing. Injunction. 266 *n.*

PERSONAL INJURIES.

Accident at crossing. Duty of traveller. 377 *n.*

Agreement for running powers. Gateman. Duty of railroad company operating road under agreement to pay another company specified sum for use of tracks where gates and gatemen are maintained. Responsibility for negligence of gateman whose services it has accepted. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Backing train. Duty of company. Where train has just passed and is backing again company should have person on rear car so that he may give warning. Duane *v.* Chicago, etc., R. Co. (Wis.). 416.

Boy coasting. Instruction that unless employees failed to make use of appliances to prevent accident after they became aware of danger, or of fact that deceased was riding down hill on a sled, finding should be for defendant, *held* properly refused being applicable only where injured party was a trespasser upon the track. Erwin *v.* St. Louis, etc., R. Co. (Mo.). 390.

Contributory negligence. 363 *n.*

Contributory negligence. Absence of care. Where party drove on track with the view obstructed, and wind blowing which deadened sound of train, and train was running at unusual rate of speed and gave no signal, *held* that facts required submission of case to jury. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Contributory negligence. Accident at crossing. Horses taking fright. 383 *n.*

Contributory negligence. Crossing in front of moving train. 424 *n.*

Contributory negligence. Crossing in view of train. Where deceased saw train and thought he could pass before it reached crossing and whipped up his horses, being under the influence of liquor, and acted recklessly, *held* that there could be no recovery. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Contributory negligence. Duty to stop, look, and listen. 325 *n.*

CROSSING—*Continued.*

Contributory negligence. Duty to look. Where there are circumstances which might prevent person injured from looking, instruction that jury must find for defendant if deceased could have seen approach of train, or was notified of approach before he started, *held* properly refused. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Contributory negligence. Failure to look. Fact that person driving at trot as he approached crossing did not look past certain cars for purpose of ascertaining if there was any train approaching, *held* not sufficient to charge him with want of due care. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Contributory negligence. Infant. Where boy of eleven years was killed at crossing, instruction that jury should consider boy's age and discretion *held* erroneous and misleading. Erwin *v.* St. Louis, etc., R. Co. (Mo.). 390.

Contributory negligence. Instructions. If court instruct that deceased was required to use such care as man of ordinary prudence would have used, defendant is not entitled to instruction that it was his duty to make use of his senses of sight, hearing, etc. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Contributory negligence. Instruction. Illustration. Court, in submitting question whether deceased was guilty of gross negligence, illustrated remarks by stating case of one going upon track to commit suicide, *held* that the charge was not misleading. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Contributory negligence: liability notwithstanding. Although party injured is negligent, company is still liable if, by exercise of ordinary care after discovery of danger, accident could have been prevented, or if company failed to discover danger when exercise of ordinary care would have discovered it. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Contributory negligence: liability notwithstanding. Party injured at crossing is entitled to recover, notwithstanding want of ordinary care on his part, if those in charge of train could, by exercise of ordinary care, have avoided injuring him. Louisville, etc., R. Co. *v.* Schuster (Ky.). 407.

Contributory negligence: liability notwithstanding. Where person attempted to cross in full view of engine, but fell and was run over, instruction directing verdict for defendant is erroneous, as company might be liable if engineer could have prevented the accident. State *v.* Baltimore & O. R. Co. (Md.). 412.

Contributory negligence. Looking and listening. It is duty of one about to cross crossing to look and listen for approaching train. Duty when track is obstructed. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Contributory negligence. Looking and listening. It is not error for court to omit to instruct that it was duty of plaintiffs as they approached track to look and listen, if the charge as to contributory negligence has been given in general terms, negligence not being a question of law. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Contributory negligence. Looking and listening. Travellers upon highway which runs parallel to track before crossing it are under no obligations to look for train before they discover crossing. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Contributory negligence. Looking and listening. Where train had passed within view of person intending to cross so that he had no reason to expect approach of train in direction from which such train went, rule requiring travellers to look and listen has no application if such person was injured by backing of such train without warning. Duame *v.* Chicago, etc., R. Co. (Wis.). 416.

Contributory negligence. Nonsuit. Where party familiar with dangerous crossing stopped, looked down the track and listened, but did not look up the track because he could not see along it, and finding from the time that no train was due, drove upon the track and was injured by irregular train

CROSSING—*Continued.*

approaching at high rate of speed without warning, *held* error to direct compulsory nonsuit. McWilliams *v.* Philadelphia, etc., R. Co. (Pa.). 401.

Contributory negligence. Obstructed view. If view of track is partially obstructed, greater care is required of traveller than would be if he had open view. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Contributory negligence. Open gate. Persons approaching crossings may presume that gatemen are discharging their duties. Open gate is notice of safe crossing, and in absence of other circumstances it is not negligence to drive at trot onto tracks through open gate, though view is obstructed. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Contributory negligence. Parties were killed while crossing track with view partly obstructed, the jury having the right to infer that they looked and listened, and there was negligence on the part of the company in running train at greater rate of speed than statutory rate, and leaving gate open; *held* that company was liable. State *v.* Boston & M. R. Co. (Me.). 356.

Contributory negligence. Passing between cars. If person knows that cars are stopping temporarily, and he attempts to pass between them on the draw-bars, he is, as a matter of law, guilty of contributory negligence even though directed to so pass by a brakeman. Lake Shore, etc., R. Co. *v.* Pinchin (Ind.). 383.

Contributory negligence. Province of jury. 369 *n.*, 402 *n.*

Contributory negligence. Province of jury. Where deceased could not have seen or heard train until his horses were within four feet of track, and when car was almost behind him horses stepped upon rail and he was thrown under car and killed, and no signal was given by engine which was pushing car, *held* that verdict of jury upon contributory negligence of plaintiff was properly taken. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Contributory negligence. Question of fact. Question as to whether person injured at crossing was guilty of contributory negligence is usually one of fact. Omaha, etc., R. Co. *v.* O'Donnell (Neb.). 346.

Contributory negligence. Sufficiency of crossing. Cripple who left safe path along sidewalk to go upon road leading across railroad over plank crossing on dark night, and who got beyond planking and stumbled among the rails and was injured, *held* guilty of contributory negligence. Delaware, etc., R. Co. *v.* Cadow (Pa.). 406.

Duty of company. 327 *n.*

Exceptionally dangerous crossing. Duty of company using tracks across generally travelled street in populous city for its convenience in switching, whereby crossing is rendered exceptionally dangerous. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Finding of jury. Stfficiency of evidence. 404 *n.*

Flagman and gates: duty to maintain, at crossings at generally travelled street in populous town where track is used for switching. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Flagman. Employment. Common crossing. Where tracks of three companies are laid along a street which intersects three other streets, at each of which each company stationed and paid a flagman who flagged all trains, *held* that company employing flagman was responsible for his negligence, although such negligence happened when flagging train of another company. Buchanan *v.* Chicago, etc., R. Co. (Iowa). 378.

Flagman: necessity of. Pleading. Instruction. 345 *n.*

Flagman: necessity of. Statutory requirements. 345 *n.*

Gate. Leaving gate open is invitation to persons to cross. State *v.* Boston & M. R. Co. (Me.). 356.

Gateman: duty of. Gateman should observe tracks and know when it becomes dangerous for persons to cross, and knowing so to close gates and keep them closed, and when tracks are clear to open gates and keep them open. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

CROSSING—*Continued.*

Horses taking fright at cars. 333 *n.*

Horses taking fright. Evidence. Where plaintiff was injured through horses taking fright at box car standing partially on highway, testimony that other horses had taken fright at same car is inadmissible. Cleveland, etc., R. Co. *v.* Wynant (Ind.). 328.

Horses taking fright. Liability. If car at which horses took fright was moved onto highway by persons for whom defendant was not responsible, company is not liable for injuries, unless it negligently permitted car to remain an unreasonable time. Cleveland, etc., R. Co. *v.* Wynant (Ind.). 328.

Imputed negligence. In Maine the negligence of the driver is not imputed to a passenger carried gratuitously, who has no control over the driver. State *v.* Boston & M. R. Co. (Me.) 356.

Imputed negligence. Parent and child. 362 *n.*

Inevitable accident. Instruction that if neither party was guilty of negligence, and injury was result of accident, no recovery can be had, cannot be to defendant's prejudice. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Instruction. Hypothetical case. Where there is evidence that train struck oxen drawing wagon, instruction upon hypothetical case of collision between engine and wagon cannot be deemed misleading. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Invitation to cross. Evidence *held* sufficient to present for determination of jury, question whether inducement had been held out to public to use crossing. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Invitation to cross track. Company by the formation of a crossing may extend invitation to persons to use such crossing for purpose of access to premises of others, though not necessarily to any public way beyond. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Invitation to public. License. 325 *n.*

Invitation to public. License. If person attempting to cross track merely by license of company and not from circumstances in which invitation to treat same as a highway can be inferred, no recovery can be had for negligence causing death. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Listening for train. Fact that person was shown not to have listened for train *held* not sufficient to preclude recovery, there being evidence that witnesses in neighborhood heard no sound of approaching train until alarm signal was sounded, although engineer may have testified that he rang bell. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Negligence. Province of court. After trial judge has defined negligence and contributory negligence, it is not error to refuse to instruct with reference to actions of deceased in attempting to cross in front or in regard to her duty to look and listen, these being matters for the jury. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Obstructed view. Where certain bushes growing outside of right of way were bare of leaves and no obstruction to view, court should not instrucr that it was negligence for company to suffer bushes to grow on right of way so as to obstruct view. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Ordinance. Evidence. Ordinance limiting speed and requiring signals is properly admitted in evidence where track-repairer is injured within limits of city. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Permission to cross. If by implied assent of company public are permitted to cross track those in charge of train should be on lookout and give notice of their approach. Louisville, etc., R. Co. *v.* Shuster (Ky.). 407.

Pleading. Petition. If petition alleges negligence on part of defendant causing death of plaintiff's son, that without negligence on part of deceased he was struck by passing train, these allegations are sufficient. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Pleading. Statute of limitations. If ordinary declaration alleges injuries to have been caused by moving of locomotive whilst amended declaration

CROSSING—*Continued.*

filed after lapse of statutory period alleges improper signalling as further cause, plea of statute of limitations to whole declaration does not raise question of statutory bar as applied to allegations of negligence of flagman. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Public road. Establishment. Fact that statute authorizes laying out and establishment of roads by county authorities, does not negative existence of roads otherwise established, and relieve company from duty of running trains across public road by dedication, so as to avoid injury. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Signal and sign. Statutory provision. Although there may be no express provision of law requiring sign or signal, it may be question for jury whether such precautions ought not to be taken. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Signals. Character of warning required to be given. 350 *n.*

Signals. Demurrer to evidence. Where evidence upon question whether bell was rung or man standing on car to give danger signal while train was being backed is conflicting, an instruction in nature of demurrer to evidence is properly overruled. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Signals. Duty to give warning signals at crossing. 349 *n.*

Signal: failure to give. Except in case of sudden emergency, fact that engineer was otherwise engaged and did not give statutory signal is no justification to company. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Signal. Failure to give statutory signal when train was running at high rate of speed and not upon regular time, is to be considered in deciding question of negligence and contributory negligence. Omaha, etc., R. Co. *v.* O'Donnell (Neb.). 346.

Signals. Frightening horses. Province of jury. 383 *n.*

Signal. Negligence. It is negligence *per se* to fail to sound whistle 80 roads from crossing, but it does not excuse traveller from exercising due care. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Signals. Nonsuit. Where party was killed while crossing track with head wrapped up when wind was blowing, and whistle was blown but not continuously until train reached crossing, as required by statute, *held* that motion for nonsuit was properly refused, as deceased might have heard signal which ought to have been given. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Signal. Statutory signals. 351 *n.*

Signal; where required. 350 *n.*

Signal. Whether signals are necessary is a question of fact. 351 *n.*

Speed. Absence of flagman. Where statute prohibits running of train at greater speed than certain rate, unless flagman and gate is maintained, fact that gate has been left open and unattended gives right to expect that train will not pass at greater speed than ordinary rate, besides being evidence that train is not expected. State *v.* Boston & M. R. Co. (Me.). 356.

Speed: prohibited rate. City ordinance. 362 *n.*

Speed. Statutory regulation. Where speed at particular place is limited to six miles an hour, refusal to instruct that speed was not proximate cause of accident, when if it had not been for an excessive speed train would not have been near crossing when deceased attempted to cross over, *held* proper. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Travelling over partially obstructed crossing. 333 *n.*

Trespasser. Passing between cars. Person finding crossing obstructed by standing train, who proceeded along track to place where opening had been made in train and attempted to cross there, *held* a trespasser. Dahlstrom *v.* St. Louis, etc., R. Co. (Mo.). 387.

Unavoidable accident. 383 *n.*

CROSSING—*Continued.*

INJURIES TO ANIMALS.

Degree of care. Railroad company is bound to use ordinary care and diligence as to stock rightfully on highway. 449 *n.*

Evidence *held* to show that cow was killed within right of way, and not on crossing, as was claimed by company. Union Pac. R. Co. *v.* Blum (Neb.). 119.

Injuries to animals at crossings. 121 *n.*

Killing stock. Duty of company. Where killing of stock at public crossing is claimed to have been caused by a defective crossing, instruction that it is the duty of the company to construct sufficient and safe crossings *held* not error. Atchison, etc., R. Co. *v.* Miller (Kan.). 190.

Signal: duty to give, in absence of statute. 449 *n.*

Signal. Duty to signal for animals. 448 *n.*

Signal: failure to give. Where cattle lawfully on highway are killed at crossing, evidence of omission to give signal before reaching crossing as required by statute is competent. Palmer *v.* St. Paul, etc., R. Co. (Minn.). 447.

Starting train. Frightening horses on right of way. While horses were being driven along right of way to farm crossing at which they had escaped, train apparently drew up for a time and proceeded again after sounding the whistle; horses were frightened, and ran on bridge and were injured; *held*, that the company was not liable. Hurd *v.* Grand Trunk R. Co. (Ont.). 459.

OTHER MATTERS.

Acquiring easement by prescription. 320 *n.*

Dedication of highway. Where land-owner allowed public use of a road and required company to make crossing, which had been kept up and used for six years, *held*, that there was evidence from which jury might infer dedication. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Easement. Acquisition by prescription. Proprietor of lands may by open and uninterrupted use for more than 20 years acquire right by prescription, although statute prohibits travelling upon crossing of railroad without consent of company. Turner *v.* Fitchburg R. Co. (Mass.). 317.

Highway by dedication. 321 *n.*

CUSTOM. See CARRIERS.

Carrier. Delivery of goods. Fact that railroad had previously delivered freight shipped to order of consignor to third party before acceptance of draft, such draft, however, having always been paid, will not justify finding that there was course of dealing which would take the case out of the rule as to proper delivery. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Carrier. Delivery of goods without presenting bill of lading. 554 *n.*

Delivery of goods. Usage. Railroad delivering cattle, consigned to shipper, to party whom it is directed merely to notify, *held* liable to bank discounting consignor's draft to such person. Fact that it was customary to so deliver shipments between same parties *held* no defence. Northern Pennsylvania R. Co. *v.* Commercial Bank (U. S.). 556.

DAMAGES. See ANIMALS; FIRE.

Death. Measure of damages. Instruction as to measure of damages to which mother is entitled for the death of her son *held* proper. Enumeration of subjects of consideration. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Exemplary damages. Refusal to carry. Railroad is liable for vindictive damages for refusal to carry goods only in case of ill-will or malicious disregard for rights of another. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

Exemplary damages: to entitle plaintiff to, they must be claimed; and negligence causing injury must have been wilful. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Opinion as to damages. 203 *n.*

DEATH.

Action by widow. Suit by deceased. Fact that deceased had instituted suit to recover damages which was pending at the time of his death is no bar to action by his widow and children. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Children. Interest in deceased's life. Under South Carolina statute, children of person killed may maintain action, although at date of the killing all of plaintiffs were adults having no legal claim on deceased for support. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Damages. Funeral expenses. In action for death funeral expenses properly constitute element in estimating damages. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Damages: measure of. Instruction as to measure of damages to which mother was entitled for death of her son, enumeration of subjects of consideration *held* not to extend the limits of investigation beyond what plaintiff would have received had her son lived. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Evidence. Coroner's inquest. In action for negligent killing, testimony of witnesses taken before coroner's inquest cannot be admitted even though offered at second trial after it has been admitted at first trial. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Pleading. Petition. If petition alleges negligence on part of defendant causing death of plaintiff's son; that without negligence on part of deceased he was struck by passing train, these allegations are sufficient. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

DESPATCH COMPANY. See CARRIERS.

DISCRIMINATION.

Action for charges. Unreasonableness. It is no defence in action by railway to recover charges that they were unreasonable so as to give undue preference to other persons. Lancashire, etc., R. Co. *v.* Greenwood (Eng.). 537.

Action for penalty. Limitation. 536 *n.*

Action for pleading. Allegation that railroad directed agents to refuse to receive or transport any goods offered for transportation by the plaintiff except when prepaid, does not state cause of action if it fails to aver that agents have refused to receive or transport goods, and that he has actually been injured. Allen *v.* Cape Fear, etc., R. Co. (N. Car.). 532.

English Railway and Canal Traffic Act: action for discrimination under. 542 *n.*

Excessive charges. Jurisdiction of railroad commissioners. Oregon board of railroad commissioners *held* to have no jurisdiction to require railroad company to refund to shipper sum of money alleged to have been exacted in excess of reasonable charge. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Pleading. 536 *n.*

Rates. Right to ship. In absence of statutory or charter regulations to the contrary, railroad may discriminate as to rates, provided no unreasonable charge is made; but no discrimination can be made in the right to ship. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

DISSOLUTION.

Action by people: general creditors have no right to notice of, and no right to intervene in action brought in behalf of people for dissolution of insolvent corporation until after final judgment. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Action by people. If attorney-general commences action in name of people against an insolvent corporation, and after appointment of temporary re-

DISSOLUTION—*Continued.*

ceiver mortgagee commences suit to foreclose, people are not necessary parties. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Confession of judgment. New York statute declaring void judgments confessed by corporation after filing petition for dissolution, does not affect consent to entry of order of sale in foreclosure proceedings, although made after action brought for dissolution. Herring *v.* New York, etc., R. Co. (N. Y.) 54.

Judgment. New corporation composed of purchasers of property and franchises of Pennsylvania corporation, and incorporated by Delaware legislature, and vested with privileges and franchises of such corporation granted by the state of Delaware, *held* not to acquire right to judgment entered in favor of old corporation. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Operation of statute. Statute providing that if company failed to finish its road within time prescribed by charter, the corporation shall be dissolved, is not self-operating, and the corporate existence does not terminate without judicial proceedings. Day *v.* Ogdensburg, etc., R. Co. (N. Y.). 102.

Powers conferred on courts in actions for dissolution of corporation is not affected by chapter of Code of Civil Procedure which substitutes actions in place of writs of *scire facias* and *quo warranto*. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Sale of property. Dormancy. Sale of property and franchises of corporation in Pennsylvania and act of Delaware legislature incorporating purchasers and vesting them with franchises granted to such corporation by state of Delaware, *held* not to pass right to judgment entered in favor of old corporation before the sale. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Sale of road. Purchase of stock and destruction of bonds of one railroad by stockholders of another, and sale of such purchased road to the road in which they were stockholders, *held* not to operate as a dissolution of the road whose stock and bonds they had purchased so as to relieve it from its debts and obligations. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

Title. Relation back. Equitable rule giving receiver title to property by relation back, does not confer upon him title which will override a disposition of the property made by the court before his appointment. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

EASEMENT. See CROSSINGS.

EQUITY. See RECEIVER.

EVIDENCE. See ANIMALS; FENCES.

Carriers. Letters from agents of connecting lines. Railroad cannot introduce letters written to its agents by agents of connecting road regarding mistake in transporting freight received from such road causing delay. Waite *v.* New York, etc., R. Co. (N. Y.). 576.

Coroner's inquest. In action for negligent killing, testimony of witnesses taken before coroner's inquest cannot be admitted even though offered at second trial after it has been admitted at first trial. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430

Declarations. Carriers of live stock. In action against company for loss of jack, declarations of tramp found in the car with the dead jack *held* inadmissible. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Failure to call witness who was with plaintiff at time he fell into hole in depot grounds *held* not to raise a presumption that such person would testify against plaintiff's theory of the accident. Cross *v.* Lake Shore, etc., R. Co (Mich.). 476.

Opinion as to damages. 203 *n.*

EVIDENCE—*Continued.*

Opinion as to value. 203 *n.*

Opinion. Competency of witness. In action for injury to stock, witnesses who have had experience in the business for which animals are used can competently testify as to their value. Texas, etc., R. Co. *v.* Virginia, etc., Co. (Tex.). 201.

Opinion evidence. 202 *n.*

Opinion. Non-expert. Witnesses not shown to be experts may testify to facts which appear to be opinions or conclusions of facts if subject-matter cannot be described as it appeared to witness, and opinions are founded on facts such as men in general are capable of comprehending. Atchison, etc., R. Co. *v.* Miller (Kan.). 190.

Ordinance limiting speed, and requiring signals, is properly admitted in evidence where track-repairer is injured within limits of city. Kelly *v.* Union R. & T. Co. (Mo.) 396.

Other accidents. Where plaintiff sues to recover for injuries sustained through horses taking fright at car standing upon highway, testimony that other horses have been frightened at same car is inadmissible. Cleveland, etc. R., Co. *v.* Wynant (Ind.). 328.

Parol evidence. Bill of lading. Where bill of lading has been executed in duplicate-parol proof of contents is incompetent until after satisfactory excuse for non-production of both parts of instrument. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Secondary evidence. Documents in another state. In action for killing stock, if the plaintiff's claim be in possession of person in another state, and not under control of party wishing to introduce it, secondary evidence may be admitted to prove its contents. Memphis, etc., R. Co. *v.* Hembree (Ala.). 128.

EXPRESS COMPANIES.

Carriers: express companies are. 496 *n.*

Foreign corporation. License. Kentucky act requiring foreign express companies to procure license is not in violation of federal constitution. Woodward *v.* Commonwealth (Ky.). 498.

License. Construction of statute. Kentucky act requiring all agents of foreign express companies to secure license not affected by subsequent act requiring foreign express companies to pay fee upon renewing license. Woodward *v.* Commonwealth (Ky.). 498.

License. Repeal of law. Kentucky act requiring agents of foreign express companies to take out license is not repealed by subsequent act requiring all companies to pay tax of six per cent upon net profits. Woodward *v.* Commonwealth (Ky.). 498.

Limiting liability. 496 *n.*

Loss of goods. Notice of claim. Condition in receipt that, in order to recover for loss, written claim must be presented within thirty days after receipt of package is reasonable, but not always imperative; where claim was presented as soon after discovery of loss as was reasonably possible, condition will not preclude recovery. Glenn *v.* Southern Ex. Co. (Tenn.). 627.

FARM CROSSINGS. See CROSSINGS.

FAST FREIGHT LINES. See CARRIER.

FENCES. See ANIMALS.

Cattle guards. 189 *n.*

Cattle guards in streets of towns and villages. 189 *n.*

FENCES—*Continued.*

Cattle guards. Under Indiana statute authorizing land-owner to construct private crossing, railroad company is not bound to construct and maintain cattle guards at such crossing. Pennsylvania Company *v.* Spalding (Ind.). 184.

Defective fences. Clear preponderance of evidence, *held*, to show that railway fence was in defective condition and that cow was killed within right of way, and not on crossingas was claimed by company. Union Pac. R. Co. *v.* Blum (Neb.). 119.

Depot grounds. Construction of statute. Horse driven across depot grounds, *held*, "not running at large" within the meaning of the statute giving right of recovery against company for stock killed while running at large at point where right to fence exists. Johnson *v.* Chicago, etc., R. Co. (Iowa). 131.

Depot grounds: duty of company to fence at. 133 *n.*

Duty of railroad company to fence. 132 *n.*

Duty of railway company to fence. 165 *n.*

Duty to construct. Depot grounds. 172 *n.*

Duty to construct. Depot grounds. Criterion by which question whether place where stock entered upon track was or was not within depot grounds. Rinear *v.* Grand Rapids & I. R. Co. (Mich.). 166.

Duty to construct. Depot gronnds. Grounds upon main track upon which are watertank, telegraph office, ticket office, and place for eating and sleeping, occupied by stationmen, and upon which there is platform where trains stop, are depot grounds within meaning of Wisconsin statute. Peters *v.* Stewart (Wis.). 174.

Duty to construct. Depot grounds. Question whether place where stock entered upon track was or was not within depot grounds, if undisputed, becomes a question of law for the court whether defendant is liable. Rinear *v.* Grand Rapids & I. R. Co. (Mich). 166.

Duty to construct. Station. Siding. Railroads are not required to fence tracks at stations or sidings or across streets, and not liable for killing animals at such places without negligence. Beckdolt *v.* Grand Rapids & I. R. Co. (Ind.). 168.

Duty to construct. Streets and highways. Crossings. 173 *n.*

Entry on track through opening: verdict implying, is not supported by evidence that animals were upon track at point nearer opening than certain street-crossing but could not be tracked to either crossing or opening. Rhines *v.* Chicago, etc., R. Co. (Iowa). 123.

Failure to fence. In action to recover double damages, in which jury were instructed that plaintiff can recover only when he proves that animals entered on track through an opening, verdict implies a finding that animals so entered. Rhines *v.* Chicago, etc., R. Co. (Iowa). 123.

Failure to construct. Damages. For neglect of company to fence track, landowner may recover dimunition of rental value of farm. Damages are not necessarily limited to what it would cost to build a fence. Emmons *v.* Minneapolis, etc., R Co. (Minn.). 126.

Gate: construction of. Under Iowa statute, gate may be constructed so as to open either outward or inward, nor does it matter that fastening is on side next to the pasture. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gate: duty of land-owner to give notice of defective. 117 *n.*

Gate. Farm crossing: where gates are allowed at. 118 *n.*

Gate. Fastening. Evidence that fastening claimed to have been insufficient was like those in general use is not admissible. Payne *v.* Kansas City, etc., R. Co. (Iowa). 115.

Gate hung on outside. Though there is no obligation upon company to hang gate upon any particular side of fence, admission of testimony that there was nothing to prevent hanging of gate on inside, *held*, not to prejudice defendant. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gates in railway fences. 117 *n.*

FENCES—*Continued.*

Gate. Insufficiency of similar fastenings. Admissibility of evidence tending to show that other fastening similar to fastening on gate in question had proved insufficient in practice. Payne *v.* Kansas City, etc., R. Co. (Iowa) 113.

Gate. Insufficient fastening. Gate is part of fence, and, if insufficent to turn cattle, there is a failure to fence within meaning of statute. Rule not altered by fact that insufficiency is caused by reason of fastening being out of repair. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gate left open by land-owner. 117 *n.*

Gate. Opening. Evidence tending to show that there were calves on the other side of the right of way, belonging to the cows in question, *held*, admissible for purpose of showing that gate was opened by pressure of cows against it. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gate. Sufficiency of fastening. When gate opens outward on track, fastening is not sufficient if gate opens by mere pressure against it. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Insufficiency. Evidence. Testimony that barbed wire was so close to ground that horses had stepped over it, leaving bunches of hair on the barbs, and that their tracks were plainly seen, *held*, to sustain charge of negligence on part of company in not protecting track by sufficient fence. Missouri Pac. R. Co. *v.* Metzger (Neb.). 148.

Obligation to fence. Under statute providing that company need not fence at depots, etc., question whether it is bound to fence at point where opening has been made for accommodation of shipper is properly left to jury. Rhines *v.* Chicago, etc., R. Co. (Iowa). 123.

Open gate. Province of jury. If evidence tends to show that stock passed through a gate which had been open for about 36 hours, whether failure to inspect the gate for three or four days is negligence and whether gate being open for 36 hours will raise presumption of negligence are matters for determination of the jury. Wait *v.* Burlington, etc., R. Co. (Iowa). 194.

Opening fence. Cattle escaped onto track at same point at which owner had unwound wires to drive them into the field from the right of way along which he had been driving them. *Held*, that the company was not liable, on negligence on its part in maintaining the fence having been shown. Davidson *v.* Central Iowa R. Co. (Iowa). 158.

Private crossing. Gate. Company erecting gate and constructing private crossing is under no obligation either by statute or implied contract to keep gate in repair or closed. Evansville, etc., R. Co. *v.* Mosier (Ind.). 190.

Private crossing. If land-owner takes advantage of statute which authorizes him to construct crossing and imposes upon him duty of maintaining gates, railroad, in absence of negligence, is not liable for killing cattle at such crossing, even though cattle belonged to third person. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

Private crossing. Liability of company. 184 *n.*

Private crossing. Under Indiana statute, railroad is not liable for stock injured at private crossing though the crossing may have been constructed before passage of statute authorizing land-owner to c nstruct crossing and imposing upon him duty of maintaining gates. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

Private crossing. Where statute authorizes land-owner to construct crossing, but imposes upon him duty of maintaining gates, the companies are not liable for injuring cattle at such crossing, even though cattle belonged to third person. Pennsylvania Company *v.* Spaulding (Ind.). 184.

Sufficiency of fence. Drifted snow. 118 *n.*

Title of act. Constitutionality. Statute providing that all gates at farm crossings, shall, in the absence of an agreement, be constructed, etc., by land-owner, may be inserted in statute entitled "An act requiring railroad corporations to fence their right of way," etc. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

FERRYMEN. See CARRIERS.

FIRE.

Communication from premises of company. Where house was destroyed by fire communicated from freight shed of company, which was ignited by sparks from locomotive, *held*, that questions put to jury were proper and that there was sufficient evidence of negligence to sustain finding for the plaintiff. Canada Southern R. Co. *v.* Phelps (Can.). 207.

Continuance. Absent witnesses. Affidavit that absent witnesses would prove value of property to be much less than that claimed by plaintiff, *held*, not sufficient to warrant granting of continuance. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Contributory negligence. 245 *n*.

Damages. Growing grass. Value of grass at place at which it was grown is proper measure of damages, and plaintiff is entitled to interest. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Damages: measure of. Destruction of grass-roots. 245 *n*.

Damages: measure of. Destruction of orchard. 246 *n*.

Defective engine. Pleading and proof. Allegations of negligence in plaintiff's complaint, *held*, not to be construed as including allegation that company s engine was defective. St. Louis, etc., R. Co. *v.* Fudge (Kan.). 246.

Defective engines. 244 *n*.

Evidence. Former fires in wood-yard. 237 *n*.

Evidence. Other fires. Evidence tending to show that other fires were set about same time by same engine which set fire for which action is brought is competent. Haseltine *v.* Concord R. Co. (Mass.). 236.

Evidence: sufficiency of. 244 *n*.

Insurable interest. Although company has by statute insurable interest in all property along line of road, right of owner to recover is not affected by reason of fact that company have been unable to obtain insurance. Haseltine *v.* Concord R. Co. (Mass.). 236.

Jurisdiction. Under Texas statute, action for causing fire may be brought in county through which road runs and at county seat at which it has an agent, although property destroyed was in another county. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Other fires. 243 *n*.

Personal property. Statutory provision. Under statute rendering company liable for property destroyed by fire, owner of personal property may recover although personalty was only temporarily left near track. Haseltine *v.* Concord R. Co. (Mass.). 236.

Pleading. 249 *n*.

Presumption of negligence. 243 *n*.

Presumption of negligence. Escape of sparks. 242 *n*.

Presumption. Escape of sparks: where it is proved that fire was caused by, testimony is sufficiently *prima facie* to establish negligence. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Proof of fires caused and sparks emitted at other times. 237 *n*.

Sparks: usual quantity of. 243 *n*.

Special findings. Verdict. Where no defect in engine was alleged, and where fire according to finding of jury may have escaped wholly by reason thereof, *held*, error for court to render judgment upon such finding. St. Louis, etc., R. Co. *v.* Fudge (Kan.). 246.

Spreading fire. Liability of company where fire spreads. 235 *n*.

Spreading. If company are negligent in running locomotive, they are responsible for damages caused to property by fire communicated thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine. Canada Southern R. Co. *v.* Phelps (Can.). 207.

than incidental importance in this case. The object of the evidence was not to establish any obligation on the part of the company by proof of a custom, or to show that it was a duty of the carrier, fixed by usage in the course of business, to hold the horses at the place of destination, upon which plaintiff seeks to recover in this action; but the object was to show that because of such usage the stock was not in fact delivered. The fact of delivery or not was susceptible of positive proof, and there was positive proof upon the question. It seems hardly probable that the company would deliver the horses until the freight had been paid, and it is not claimed that they did. However, we may say that to warrant the introduction of usage or custom in the course of trade it is necessary to show that it is uniform, reasonable, and notorious, and the custom must be established by a witness or witnesses who are experienced in such transactions, and who can testify to the facts constituting the custom. Opinions are not sufficient, nor are reports or reputation. 2 Greenl. Ev. §§ 251, 252; 2 Redf. R. R. § 184. The evidence objected to does not come up to the required standard, so the assignment of error must be sustained. Appellant says the court erred in "permitting Fagan to give his opinion as to what the stock would have been worth at Memphis if they had not been injured in transportation." Knowledge of the market value of an article is hardly an opinion. It is a fact known from information. If a witness is not fully qualified to state the fact, a cross-examination will show it. Such matters go to the weight of the evidence and the credibility of the witnesses, and not to the competency of the testimony. The question here raised as to the correct measure of damages will be noticed hereafter.

Opinion evidence as to value of stock.

The seventh and ninth assignments of error are to the same effect, and are based on the refusal of the court to allow defendant to prove by the witness Michelson that the universal custom of all railroads, and particularly that of defendant, had been at all times, and still was, not to ship live-stock, or receive the same for shipment, of any kind whatever—First. Unless the owner or agent would accompany the stock, on the same train, and at his, the shipper's, expense and risk, feed and water such stock at the points where it is unloaded for the purpose. Second. Unless the shipper would hold the railway harmless against ordinary delays in taking up freight. Third. Unless the shipper expressly agrees that, as a condition precedent to his right to any damage for any loss or injury to his stock during transportation, or previous to loading for shipment, such shipper will give notice, verified by affidavit, of his claim therefor to some general officer of the railroad company, or to the nearest station agent, before

Custom of railroads as to carriage of live stock.

the stock is removed from the point of shipment or destination, and before the stock is mingled with other stock. Fourth. Unless the shipper agrees that, in case of total loss of stock, not more than the actual cash value of the same at the place of shipment shall be the measure of damage. Fifth. Without furnishing the shipper a free pass over the line of shipment, along with the same train, to the place of destination of the stock. Defendant offered to show that such customs were general, and known to plaintiff, as well as to all shippers of live stock over railroads, and specially on defendant's railroad. The objection made to the evidence was that it would limit the liability of the carrier. It was not objected that these stipulations were set up in the answer as existing in contract between the parties, nor that the proof showed, as it did, that there was a contract containing all the agreements of the parties. Usages of trade, Mr. Greenleaf says, should be sparingly adopted by the courts as rules of law. "Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts arising, not from express stipulation, but from mere implications and presumptions and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expressions of doubtful or various senses." 2 Greenl. Ev. § 251. Usages of trade are admissible, however, to show the relative duties and rights of parties as incidents of contracts and transactions; but the usage sought to be invoked must have all the elements of a usage as to certainty, uniformity, notoriety, and reasonableness, and it must not be contrary to law. A usage cannot be a good usage if it is contrary to law or public policy. In the case before us, for example, the defendant offered to show a custom of railroads not to receive for transportation any live-stock unless under certain conditions, modifying their common-law liability. Such a custom would be bad, because railroads cannot legally refuse to ship live-stock.

Evidence of custom not admissible.

A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. If such a custom should be ever so common and uniform, it could not be sustained, because it, the custom, would be against law. Let us look at the particulars of the custom proposed in this case. It required the owner to go along on the same train with his stock, to feed and water them at his own risk and expense. The law imposes this duty on the carrier, and the carrier cannot transfer it to the shipper by custom. The shipper might agree to go with his stock, and to feed and water them at his own expense, but he could not be compelled to do so by custom, because the law requires this duty of the carrier. This custom

Custom examined and held invalid.

JUDGMENT—*Continued.*

Dissolution. Sale of property of corporation in Pennsylvania and incorporation of purchasers by Delaware legislature, *held*, not to operate as a dissolution of the original corporation, and that judgments in its favor were not extinguished, nor did they pass to the new corporation. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Finality of judgment. Foreclosure. Judgment determining that certain stocks and bonds are liable to be sold, imports absolute verity, and neither company nor creditors can impeach it in collateral proceedings. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Injunction. Allegation of defence. Where it is sought to enjoin judgment on ground that plaintiff has defence to action, and it would be inequitable to enforce judgment, facts constituting alleged defence must be pleaded, and it is not sufficient to merely allege that plaintiff had such defence. Chicago, etc., R. Co. *v.* Manning (Neb.). 618.

JURISDICTION. See UNITED STATES COURTS.

Fire. Under Texas statute, action for causing fire may be brought in county through which road runs and at county seat at which it has an agent although property destroyed was in another county. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

KILLING STOCK. See ANIMALS.

LEASE.

Crossings: duty of lessee as to. 262 *n.*

Crossing of two roads. Expenses. Lessee company while operating road receives benefit resulting from safe crossing and services of watchman, and takes them subject to burden of expense as provided by statute. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Negligence of lessee. Company cannot lease its road without statutory authority so as to absolve itself from obligations to public and liability for damages occurring through negligent use of property. International, etc., R. Co. *v.* Moody (Tex.). 607.

"Owner of track:" lessee company is, under statute requiring crossing to be maintained at joint expense of companies owning tracks. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Power to lease. Terms of mortgage and bonds held to preclude directors from exercising power of leasing road upon terms which render lessee responsible for mortgages; and fact that lease would reduce amount available for payment of coupons does not constitute breach of contract with bondholders. Day *v.* Ogdensburg, etc., R. Co. (N. Y.). 102.

Receiver. Expenses of receivership: charging, on leased line. 112 *n.*

Receiver. Liability for rent of leased line. 112 *n.*

Receiver. Priority of rentals due under lease over mortgages. 112 *n.*

Statutory authority. Under New York statute, corporation is empowered to lease road of corporation organized and constructed in Vermont, provided latter is authorized to lease its road. Day *v.* Ogdensburg, etc., R. Co. (N. Y.). 102.

LIBEL.

Carriers. Published order to servants. Instructions to servants of railroad not to ship for certain person except when freight charges are prepaid, and a request to connecting line to make similar order, is a privileged communication, and does not constitute libel in absence of express malice. Allen *v.* Cape Fear, etc., R. Co. (N. Car.). 532.

LICENSE. See CROSSING.

Express companies. Construction of statute. Kentucky act requiring all agents of foreign express companies to secure license, is not affected by subsequent act requiring foreign express companies to pay fee upon renewing license. Woodward *v.* Commonwealth (Ky.). 498.

Express companies. Foreign corporation. Kentucky act requiring foreign express companies to procure license is not in violation of Federal Constitution. Woodward *v.* Commonwealth (Ky.). 498.

Express companies. Repeal of law. Kentucky act requiring agents of foreign express companies to take out license is not repealed by subsequent act requiring all companies to pay tax of six per cent upon net profits. Woodward *v.* Commonwealth (Ky.). 498.

LIMITATIONS, STATUTE OF.

Action for penalty for discrimination by carrier. 536 *n.*

Killing stock. In absence of evidence showing manner in which company in possession of road acquired title, *held* that it must be presumed that it was operating the road under the charter of the company by which it was constructed, which contained no special limitation of actions against it. Kentucky Cent. R. Co. *v.* Kinney (Ky.). 199.

Pleading. Separate counts. If ordinary declaration alleges injuries to have been caused by moving of locomotive whilst amended declaration filed after lapse of statutory period alleges improper signalling as further cause, plea of Statute of Limitations to whole declaration does not raise question of statutory bar as applied to allegations of negligence of flagman. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Receiver may set up, in action for injuries sustained in running trains by receiver, statute requiring such suits to be brought within two years. Bartlett *v.* Keim (N. J.). 15.

Substitution of receiver. Court may, when consenting to substitution of receiver as defendant in action for personal injuries restrain him from setting up defence of Statute of Limitations, action having been commenced against company within statutory limit. Lehigh Coal & N. Co. *v.* Central R. Co. of N. J. (N. J.). 2.

LIVE STOCK. See CARRIERS.

LOCATION.

Interference with construction. Injunction. Where company has, as required by Railroad Act, filed map and survey, it may obtain injunction against any other company attempting to interfere or obstruct construction of its track. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

Right of company. Where corporation has, in pursuance of general railroad act, filed map and survey of land and given required notice, it has acquired right to construct its road upon such line in nature of lien upon the land which is exclusive as to all other companies, and free from interference. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

MAIL.

Carriage of U. S. mail. 511 *n.*

Contract for carrying. Deduction. United States statute giving postmaster-general authority to make deduction from pay of contractors where trip is not made, *held* not repealed. Chicago, etc., R. Co. *v.* United States (U. S.). 508.

MANDAMUS.

Bridge over highway. Necessity of works by another company, *held* not a fatal objection to *mandamus* proceedings against defendant. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

MANDAMUS—*Continued.*

Highway crossing. Restoration of street. *Mandamus* proceedings may be prosecuted to determine mode in which street should be restored, and to compel performance, although city council has not yet changed established grade. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Joint trial of actions. Where *mandamus* proceedings were pending against two companies to compel them to bridge their tracks and the roads were near together so that bridges should be made continuous over all the tracks, *held* not error to require both causes to be tried together. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

MAP. See LOCATION.

MASTER AND SERVANT. See AGENTS; RECEIVERS.

Receiver: wages during recovery from injury received while road was in hands of. 6 *n.*

MORTGAGE.

Foreclosure. Answer by receiver. It is the duty of a receiver to file an answer to a bill to foreclose a mortgage, although plaintiff in such bill may be the owner of all the claims, and has entered into possession of the road. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Foreclosure. Conclusiveness of judgment. Judgment of court determining that certain stocks and bonds form part of the mortgage property and that they were properly sold and never came into possession of receiver previously appointed in action by the people for dissolution, *held* binding upon the general creditors, although no final receiver had been appointed in the people's action and no final judgment rendered therein, and that fact that same person had been appointed receiver in both proceedings did not affect validity of judgment. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Confession of judgment. New York statute declaring void judgments confessed by corporation after filing of petition for dissolution, does not affect consent to entry of order of sale in foreclosure proceedings although made after action brought for dissolution. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Judgment determining that certain stocks and bonds are liable to be sold imports absolute verity, and neither company nor creditors can impeach it in collateral proceedings. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Parties. Temporary receiver appointed at instance of attorney-general *held* not a necessary party to a suit to foreclose mortgage. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Parties. Unsecured creditors are not necessary or proper parties, and have no right to intervene, but are bound by an adjudication against the mortgagee. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Receiver. Defence. Receiver cannot set up as a defence against a bill to foreclose against a mortgagee in possession an agreement with complainant by which receiver was to hold road for benefit of complainant, and the latter was to pay the receiver's costs and expenses, which he has not done. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Foreclosure. Receiver. If action has been commenced by attorney-general praying for dissolution on account of insolvency, and temporary receiver is appointed, it is within the discretion of the court to authorize commencement of foreclosure proceedings, to appoint receiver therein to supersede first receiver and to order all property delivered to him. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Receiver. Validity of bonds. Right of receiver to set up defence which goes to validity of bonds upon which suit is brought, although he has parted with possession of corporate property to mortgagee. Ryan *v.* Anglesea R. Co. (N. J.). 51.

MORTGAGE—*Continued.*

Foreclosure. Sale of property. Dormancy. Act of Delaware legislature incorporating purchasers of property and franchises of corporation in Pennsylvania and vesting them with privileges and franchises granted by state of Delaware, *held* not to operate as a dissolution of the original corporation, and judgments in its favor were not extinguished, nor did they pass to the new corporation. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Foreclosure. Sufficiency of answer. What is sufficient answer by receiver to a bill to foreclose a mortgage when the receiver has entered into an agreement with the complainant by which the latter has obtained possession of the mortgage property. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Priority. Taxes. Amount due for state tax from corporation in hands of receiver takes priority of claim upon funds in receiver's hands over claims of bondholders. Central Trust Co. *v.* New York City & N. R. Co. (N. Y.). 9.

Receiver. Surplus. Rights of creditors. If mortgage trustees fail to make claim in proceedings for appointment of receiver to funds in hands of receiver, surplus arising from receiver's management is payable to unsecured creditor at whose suit receiver was appointed. Sage *v.* Memphis, etc., R. Co. (U. S.). 40.

MUNICIPALITY.

Resolution of council. Upon report of council by committee recommending certain action, record of proceedings in the word "adopted" expresses the will of the body. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

NAME. See PLEADING AND PRACTICE.

NEGLIGENCE. See ANIMALS; FENCES; FIRE.

Appliances used. If railroad conform to rules in general use by prudently conducted companies they are free from blame unless they violate positive requirements of the law. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Exemplary damages: to entitle plaintiff to, negligence causing injury must have been wilful, wanton, or reckless. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Imputed negligence. In Maine the negligence of the driver is not imputed to a passenger carried gratuitously who has no control over the driver. State *v.* Boston & M. R. Co. (Me.). 356.

Imputed negligence. Parent and child. 362 *n.*

ORDINANCE. See SPEED.

PARENT AND CHILD. See CHILDREN.

Imputed negligence. 362 *n.*

Infant plaintiffs. Next friend. The husband of their mother has no interest in suit by infant plaintiffs to recover for killing their father, and he may act in such suit as next friend. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

PASSENGERS. See CARRIERS; STATIONS.

Approaches to depot. 486 *n.*

Defective depot grounds. Stepping into hole. 482 *n.*

Depot grounds: care required as to, by railroad companies. 482 *n.*

Depot grounds. Contributory negligence. Plaintiff after leaving ticket office was cautioned to "look out for the steps," but by crossing platform obliquely he missed them and sustained injuries. *Held*, that question of contributory negligence was for jury. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

In Iowa.—Wilde *v.* Merchants Despatch Transp. Co., 47 Iowa, 272; Bancroft *v.* Merchant's Despatch Transp. Co., 47 Iowa, 262; Stewart *v.* Merchants Despatch Transp. Co., 47 Iowa, 229; Mitchell *v.* United States Exp. Co., 46 Iowa, 214; Robinson *v.* Merchants Despatch Transp. Co., 45 Iowa, 470; McCoy *v.* Keokuk & D. M. R. Co., 44 Iowa, 424; Brush *v.* S. A. & D. R. Co., 43 Iowa, 554; Talbott *v.* Merchants Despatch Transp. Co., 41 Iowa, 247; Rose *v.* Des Moines V. R. Co., 39 Iowa, 246; German *v.* Chicago & N. W. R. Co., 38 Iowa, 127; Mulligan *v.* Illinois Cent. R. Co., 36 Iowa, 181; McDaniel *v.* Chicago & N. W. R. Co., 24 Iowa, 412; West *v.* The Berlin, 3 Iowa, 532; Carson *v.* Harris, 4 G. Greene (Iowa), 516; Whitmore *v.* Bowman, 4 G. Greene (Iowa), 148; The Wisconsin *v.* Young, 3 G. Greene (Iowa), 268.

In Kansas.—Leavenworth, L. & G. R. Co. *v.* Maris, 16 Kan. 333; St. Louis, K. C. & N. R. Co. *v.* Piper, 13 Kan. 505; Goggin *v.* Kansas P. R. Co., 12 Kan. 416; Kansas P. R. Co. *v.* Nichols, 9 Kan. 235; Kansas P. R. Co. *v.* Reynolds, 8 Kan. 623; Missouri V. R. Co. *v.* Caldwell, 8 Kan. 244; The Emily *v.* Carney, 5 Kan. 645; Kallman *v.* United States Exp. Co., 3 Kan. 205.

In Kentucky.—Louisville & N. R. Co. *v.* Brownlee, 14 Bush (Ky.), 590; s. c., 9 Cent. L. J. 101; Bryan *v.* Memphis & P. R. Co., 11 Bush (Ky.), 597; Louisville, C. & L. R. Co. *v.* Hedger, 9 Bush (Ky.), 645; Adams Exp. Co. *v.* Loeb, 7 Bush (Ky.), 499; Orndorff *v.* Adams Exp. Co., 3 Bush (Ky.), 194; Keith *v.* Amende, 1 Bush (Ky.), 455; Adams Exp. Co. *v.* Nock, 2 Duv. (Ky.) 562; Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112; Reno *v.* Hogan, 12 B. Mon. (Ky.) 63; Cassilay *v.* Young, 4 B. Mon. (Ky.) 265.

In Louisiana.—Higgins *v.* New Orleans, M. & C. R. Co., 28 La. An. 133; Kelham *v.* The Kensington, 24 La. An. 100; Levy *v.* Pontchartrain R. Co., 23 La. An. 477; Kember *v.* Southern Exp. Co., 22 La. An. 158; Simon *v.* The Fung Shuey, 21 La. An. 363; New Orleans Mut. Ins. Co. *v.* New Orleans, J. & G. N. R. Co., 20 La. An. 302; Frank *v.* Adams Exp. Co., 18 La. An. 279; Brauer *v.* The Almoner, 18 La. An. 266; Mahon *v.* The Olive Branch, 18 La. An. 107; Lewis *v.* The Success, 18 La. An. 1; Levois *v.* Gale, 17 La. An. 302; Wentworth *v.* The Realm, 16 La. An. 18; Roberts *v.* Riley, 15 La. An. 103; Edwards *v.* The Cahawba, 14 La. An. 220; Dunn *v.* Branner, 13 La. An. 452; Thomas *v.* The Morning-Glory, 13 La. An. 269; Hatchett *v.* The Compromise, 12 La. An. 783; Price *v.* The Uriel, 10 La. An. 413; Boyce *v.* Welch, 5 La. An. 623; Fassett *v.* Ruark, 3 La. An. 694; Van Horn *v.* Taylor, 2 La. An. 58; Hunt *v.* Norris, 2 Mart. (La.) 243; Baldwin *v.* Collins, 9 Rob. (La.) 468; Van Hern *v.* Taylor, 7 Rob. (La.) 201.

In Maine.—Little *v.* Boston & M. R. Co., 66 Me. 239; Burnham *v.* Grand Trunk R. Co., 63 Me. 298; Willis *v.* Grand Trunk R. Co., 62 Me. 488; Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462; Sager *v.* Portsmouth, S. & P. & E. R. Co., 31 Me. 228; Plaisted *v.* Boston & K. S. N. Nav. Co., 27 Me. 132; Bean *v.* Green, 12 Me. 422.

In Maryland.—McCoy *v.* Erie & W. Transp. Co., 42 Md. 498; McClure *v.* Philadelphia, W. & B. R. Co., 34 Md. 532; Bankard *v.* Baltimore & O. R. Co., 34 Md. 197; Baltimore & O. R. Co. *v.* Brady, 32 Md. 333; Brehme *v.* Adams Exp. Co., 25 Md. 328; McCann *v.* Baltimore & O. R. Co., 20 Md. 202; Birney *v.* New York & W. P. T. Co., 18 Md. 341; Fergusson *v.* Brent, 12 Md. 9; Ferguson *v.* Cappeau, 6 Har. & J. (Md.) 394; Barney *v.* Prentiss, 4 Har. & J. (Md.) 317; Boyle *v.* McLaughlin, 4 Har. & J. (Md.) 291.

In Massachusetts.—Hoadley *v.* Northern Transp. Co., 115 Mass. 304; Packard *v.* Earle, 113 Mass. 280; Gott *v.* Dinsmore, 111 Mass. 45; Com. *v.* Vermont & M. R. Co., 108 Mass. 7; Knowles *v.* Dabney, 105 Mass. 437;

PLEADING AND PRACTICE—*Continued.*

dict the error is not sufficient to require a reversal. Atchison, etc., R. Co. *v.* Miller (Kan.). 190.

Misnomer. Party in interest. Action commenced against one company was after expiration of statutory period for bringing suit changed by amendment to action against another company which had leased the road from the company first sued and was operating it at the time of the accident, *held*, that the action might be maintained against the lessee company. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Service of summons. Foreign corporation. Nebraska statute as to service on corporations *held* to apply to foreign corporations except where there are special provisions to contrary. Chicago, etc., R. Co. *v.* Manning (Neb.). 618.

Special findings. If in action for personal injuries jury find fact which will preclude plaintiff's recovery, judgment must be entered for defendant notwithstanding general verdict for plaintiff. Lake Shore, etc., R. Co. *v.* Pinchin (Ind.). 383.

Statute of Limitations. Separate counts. If ordinary declaration alleges injuries to have been caused by moving of locomotive, whilst amended declaration filed after lapse of statutory period alleges improper signalling as further cause, plea of Statute of Limitations to whole declaration does not raise question of statutory bar as applied to allegations of negligence of flagman. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Substitution of receiver by consent of court does not constitute a new cause of action, but is merely a proceeding in the action already brought. Lehigh Coal & N. Co. *v.* Central R. Co. of N. J. (N. J.). 2.

Variance. Although a petition alleges that stock was injured in March, fact that evidence shows that animal was injured in August is immaterial. Texas, etc., R. Co. *v.* Virginia, etc., Co. (Tex.). 201.

PRACTICE. See PLEADING AND PRACTICE.

PRESCRIPTION. See CROSSINGS.

PRIVILEGED COMMUNICATIONS. See LIBEL.

PURCHASE OF ROAD. See SALE OF ROAD.

RAILROAD COMMISSIONERS.

Authority and jurisdiction of state railroad commissioners. 550 *n.*

Jurisdiction. Adjusting differences. Act creating railroad commissioners did not give board authority to adjust differences between railroad companies and shippers, although it was empowered to hear complaints. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Powers. Extension. Powers conferred by legislature on commissioners will not be extended by implication and actions which board attempts to take will not be upheld unless authority is affirmatively shown. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Powers. Remission of charges. Provision in statute requiring commissioners to enter complaint in court of equity where its orders have been violated or neglected, *held* not to authorize such proceedings in order to enforce repayment of freight charges claimed to have been unreasonable. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Prohibition. Jurisdiction of railway commissioners. 537 *n.*

Regulating charges. Jurisdiction. Board of railroad commissioners of Oregon *held* to have no jurisdiction to require railroad company to refund to shipper sum of money alleged to have been exacted in excess of reasonable charge. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

J. L. (4 Dutch.) 180; New Brunswick Steam, etc., T. Co. *v.* Tiers, 24 N. J. L. (4 Zab.) 697; Gibbons *v.* Wade, 8 N. J. L. (3 Halst.) 255.

In New York.—Mynard *v.* Syracuse, B. & N. Y. R. Co., 71 N. Y. 180; Westcott *v.* Fargo, 61 N. Y. 542; Gleadell *v.* Thomson, 56 N. Y. 194; Condict *v.* Grand Trunk R. Co., 54 N. Y. 500; Cragin *v.* New York C. R. Co., 51 N. Y. 61; Edsall *v.* Camden & A. R. & T. Co., 50 N. Y. 661; Nelson *v.* Hudson R. R. Co., 48 N. Y. 498; Lamb *v.* Camden & A. R. & T. Co., 46 N. Y. 271; Steinweg *v.* Erie R. Co., 43 N. Y. 123; Guillaume *v.* Hamburg & A. Packet Co., 42 N. Y. 412; Bissell *v.* New York Cent. R. Co., 25 N. Y. 442; Perkins *v.* New York Cent. R. Co., 24 N. Y. 196; Wells *v.* New York Cent. R. Co., 24 N. Y. 181; Knell *v.* U. S. & B. Steamship Co., 33 N. Y. Super. Ct. (1 J. & S.) 423; Westcott *v.* Fargo, 63 Barb. (N. Y.) 349; s. c., 6 Lans. (N. Y.) 319; Limburger *v.* Westcott, 49 Barb. (N. Y.) 283; Prentice *v.* Decker, 49 Barb. (N. Y.) 21; Stedman *v.* Western Transp. Co., 48 Barb. (N. Y.) 97; Smith *v.* New York Cent. R. Co., 29 Barb. (N. Y.) 132; aff'd 24 N. Y. 222; Moore *v.* Evans, 14 Barb. (N. Y.) 524; Parsons *v.* Monteath, 13 Barb. (N. Y.) 353; Boswell *v.* Hudson R. R. Co., 5 Bosw. (N. Y.) 699; s. c., 10 Abb. (N. Y.) Pr. 442; Lee *v.* Marsh, 28 How. (N. Y.) Pr. 275; s. c., 43 Barb. (N. Y.) 102; Meyer *v.* Harden's Exp. Co., 24 How. (N. Y.) Pr. 290; Nicholas *v.* New York Cent. R. Co., 4 Hun (N. Y.), 327; French *v.* Buffalo, N. Y. & E. R. Co., 4 Keyes (N. Y.), 108; s. c., 2 Abb. App. Dec. (N. Y.) 196; Stoddard *v.* Long Island R. Co., 5 Sandf. (N. Y.) 180; Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith (N. Y.), 115; Sunderland *v.* Westcott, 2 Sween. (N. Y.) 260; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234.

In North Carolina.—Capehart *v.* Seabord & R. R. Co., 77 N. C. 355; Lee *v.* Raleigh & G. R. Co., 72 N. C. 236; Smith *v.* North Carolina R. Co., 64 N. C. 235; Harvy *v.* Pike, Taylor's N. C. Term Rep. 519; s. c., 7 Am. Dec. 698.

In Ohio.—Gaines *v.* Union Transp. & Ins. Co., 28 Ohio St. 418; Erie R. Co. *v.* Lockwood, 28 Ohio St. 358; Union Exp. Co. *v.* Graham, 26 Ohio St. 595; Knolton *v.* Erie R. Co., 19 Ohio St. 260; Cincinnati, H. & D. R. Co. *v.* Pontius, 19 Ohio St. 221; Cleveland, P. & A. R. Co. *v.* Curran, 19 Ohio St. 1; Welsh *v.* Pittsburgh, F. W. & C. R. Co., 10 Ohio St. 65; Graham *v.* Davis, 4 Ohio St. 362; Davidson *v.* Graham, 2 Ohio St. 131; Wayne *v.* The General Pike, 16 Ohio, 421; McGregor *v.* Kilgore, 6 Ohio, 358; May *v.* Babcock, 4 Ohio, 334; Muller *v.* Cincinnati, H & D. R. Co., 2 Cin. (Ohio) 280; United States Exp. Co. *v.* Bachman, 2 Cin. (Ohio) 251; aff'd, 28 Ohio St. 144; Childs *v.* Little Miami R. Co., 1 Cin. (Ohio) 481; Davis *v.* Western Union Tel. Co., 1 Cin. (Ohio) 100; Fatman *v.* Cincinnati, H. & D. R. Co., 2 Disney (Ohio), 248; Lawrence *v.* McGregor, Wright (Ohio), 193.

In Pennsylania.—Brown *v.* Camden & A. R. Co., 83 Pa. St. 316; Adams Exp. Co. *v.* Sharpless, 77 Pa. St. 516; Hays *v.* Millar, 77 Pa. St. 238; American Exp. Co. *v.* Second Nat. Bank, 69 Pa. St. 394; Delaware C. S. Towboat Co. *v.* Starrs, 69 Pa. St. 36; Patterson *v.* Clyde, 67 Pa. St. 500; Colton *v.* Cleveland & P. R. Co., 67 Pa. St. 211; Empire Transp. Co. *v.* Wamsutta, O. R. & M. Co., 63 Pa. St. 14; Wolf *v.* Western Union Tel. Co., 62 Pa. St. 83; Camden & A. R. Co. *v.* Forsyth, 61 Pa. St. 81; Shenk *v.* Philadelphia S. Propeller Co., 60 Pa. St. 109; Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; American Exp. Co. *v.* Sands, 55 Pa. St. 140; Farnham *v.* Camden & A. R. Co., 55 Pa. St. 53; Clyde *v.* Graver, 54 Pa. St. 251; Baltimore & P. Steamboat Co. *v.* Brown, 54 Pa. St. 77; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Pennsylvania R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; Hays *v.* Kennedy, 41 Pa. St. 378; Powell *v.* Pennsylvania R. Co., 32 Pa. St. 414; Verner *v.* Sweitzer, 32 Pa. St. 208; Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242; Pennsylvania

R. Co. *v.* McCloskey, 23 Pa. St. 526; Morrison *v.* Davis. 20 Pa. St. 171; Coxe *v.* Heisley, 19 Pa. St. 243; Chouteaux *v.* Leech, 18 Pa. St. 224; Camden & A. R. Co. *v.* Baldauf, 16 Pa. St. 67; Gales *v.* Hailman, 11 Pa. St. 515; Laing *v.* Colder, 8 Pa. St. 479; Vanderslice *v.* The Superior, 9 Pa. L. J. 116; Bell *v.* Reed, 4 Binn. (Pa.) 127; Forbes *v.* Dallett, 9 Phila. (Pa.) 515; Weir *v.* Exp. Co., 5 Phila. (Pa.) 355; Newburger *v.* Howard & Co.'s Exp., 6 Phila. (Pa.) 174; Ritz *v.* Pennsylvania R. Co., 3 Phila. (Pa.) 82; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533; Beckman *v.* Shouse, 5 Rawle (Pa.), 179; Atwood *v.* Reliance Transp. Co., 9 Watts (Pa.), 87; Warden *v.* Greer, 6 Watts (Pa.), 424; Harrington *v.* McShane, 2 Watts (Pa.), 443; Hart *v.* Allen, 2 Watts (Pa.), 114; Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44; Bingham *v.* Rogers, 6 Watts & S. (Pa) 495; Humphreys *v.* Reed, 6 Whart. (Pa.) 435; Hand *v.* Baynes, 4 Whart. (Pa.) 204.

In Rhode Island.—Hubbard *v.* Harnden Exp. Co., 10 R. I. 244.

In South Carolina.—Levy *v.* Southern Exp. Co., 4 S. C. 234; Porter *v.* Southern Exp. Co., 4 S. C. 135; McClures *v.* Hammond, 1 Bay (S. C.), 99; Gaither *v.* Barnet, 2 Brev. (S. C.) L. 488; Patton *v.* Magrath, Dudl. (S. C.) L. 159; Charleston & C. Steamboat Co. *v.* Bason, Harp. (S. C.) L. 262; Marsh *v.* Blyth, 1 Nott & McC. (S. C.) 170; Baker *v.* Brinson, 9 Rich. (S. C.) L. 201; Stadhecker *v.* Combs, 9 Rich. (S. C.) L. 193; Swindler *v.* Hilliard, 2 Rich. (S. C.) 286; Parker *v.* Brinson, 2 Rich. (S. C.) L. 201; Reaves *v.* Waterman, 2 Spears (S. C.), 197; Singleton *v.* Hilliard, 1 Strobh. (S. C.) L. 203; Cameron *v.* Rich, 4 Strobh. (S. C.) L. 168; s. c., 5 Rich. (S. C.) L. 352.

In Tennessee.—East Tennessee & G. R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272; Memphis & C. R. Co. *v.* Jones, 2 Head (Tenn.), 517; Nashville & C. R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271; Southern Exp. Co. *v.* Womack, 1 Heisk. (Tenn.) 256; Walker *v.* Skipwith, Meigs (Tenn.), 502; Craig *v.* Childress, Peck (Tenn.), 270; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Jones *v.* Walker, 5 Yerg. (Tenn.) 427; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Olwell *v.* Adams Exp. Co. (Tenn.), 1 Cent. L. J. 186.

In Texas.—Cantu *v.* Bennett, 39 Tex. 303; Fowler *v.* Davenport, 21 Tex. 626; Austin *v.* Talk, 20 Tex. 164.

In Vermont.—Newell *v.* Smith, 49 Vt. 255; Cutts *v.* Brainerd, 42 Vt. 566; Mann *v.* Birchard, 40 Vt. 326; Blumenthal *v.* Brainerd, 38 Vt. 402; King *v.* Woodbridge, 34 Vt. 565; Kimball *v.* Rutland & B. R. Co., 26 Vt. 247; Farmers & M. Bank *v.* Champlain Transp. Co., 18 Vt. 131; s. c., 23 Vt. 186; Spencer *v.* Dagget, 2 Vt. 92.

In Virginia.—Virginia & T. R. Co. *v.* Sayers, 26 Gratt. (Va.) 328; Wilson *v.* Chesapeake & O. R. Co., 21 Gratt. (Va.) 654; Friend *v.* Woods, 6 Gratt. (Va.) 189.

In Wisconsin.—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85; Hooper *v.* Chicago & N. W. R. Co., 27 Wis. 81; Wahl *v.* Holt, 26 Wis. 703; Glass *v.* Goldsmith, 22 Wis. 488; Strohn *v.* Detroit & M. R. Co., 21 Wis. 554; Boorman *v.* American Exp. Co., 21 Wis. 152; Betts *v.* Farmers Loan & T. Co., 21 Wis. 80; Martin *v.* American Exp. Co., 19 Wis. 336; Peet *v.* Chicago & N. W. R. Co., 19 Wis. 118.

As to How Far Common Carriers May Limit Their Common-law Liability by Contract, see Central R. & B. Co. *v.* Smitha (Ala.), 4 So. Rep. 708; Alabama & G. S. R. Co. *v.* Sherrod, 84 Ala. 178; Alabama & G. S. R. Co. *v.* Thomas, 83 Ala. 343; Brown *v.* Cunard S. S. Co. (Mass.), 16 N. E. Rep. 717; Tarbell *v.* Royal Exch. Shipping Co. (N. Y.), 17 N. E. Rep. 721; Kaiser *v.* Hoey, 1 N. Y. Supp. 429; Glenn *v.* Southern Exp. Co. (Tenn.), 8 S. W. Rep. 152; Gulf, Colorado & S. F. R. Co. *v.* Trawick (Tex. App.), 4 S. W. Rep. 567; The Portuence, 35 Fed. Rep. 670.

In the case of New York Cent. R. Co. *v.* Lockwood, 84 U. S. (17 Wall. 357; bk. 21, L. ed. 626, after holding that common carriers cannot con-

RECEIVER—*Continued.*

party to a suit to foreclose. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Torts committed before receiver was appointed. 5 *n.*

RIGHT OF WAY. See LOCATION.

SALE OF ROAD.

Branch road. Purchase. Statute authorizing company to locate, construct, and operate a branch line does not confer power to purchase line already constructed. Gulf, etc., R. Co. *v.* Morriss (Tex.). 94.

Dissolution. Liability for debts. Purchase of stock and destruction of bonds of one railroad by stockholders of another and sale of such purchased road to the road in which they were stockholders, *held*, not to operate as a dissolution of the road whose stock and bonds they had purchased so as to relieve it from its debts and obligations. Gulf, etc., R. Co. *v.* Morriss (Tex.). 94.

Power to sell railway property and franchises. 101 *n.*

Statutory authority. By railroad incorporation law of Texas, there is no authority conferred upon railroads to sell their tracks nor to purchase track of another company. Gulf, etc., R. Co. *v.* Morriss (Tex.). 94.

SIGN. See CROSSING.

SIGNAL.

Animals at crossings. Duty to give signal in absence of statute. 449 *n.*

Animals. Crossing. Where cattle are killed at crossing, evidence of omission to give signal before reaching crossing, as required by statute, is competent. Palmer *v.* St. Paul, etc., R. Co. (Minn.). 447.

Animals. Duty to signal for animals at crossings. 448 *n.*

Crossing. Character of signal required to be given. 350 *n.*

Crossing. Demurrer to evidence. Where evidence upon question whether bell was rung or man standing on car to give danger signal while train was being backed is conflicting, an instruction in nature of demurrer to evidence is properly overruled. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Crossing. Duty to give warning signal at crossing. 349 *n.*

Crossing. Frightening horses. 383 *n.*

Crossing. Negligence. It is negligence *per se* to fail to sound whistle 80 rods from crossing, but it does not excuse traveller from exercising due care. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Crossing. Statutory provision. Although there may be no express provision of law requiring signals on approaching crossings, it may be question for jury whether such precautions are necessary. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370

Crossing. Statutory signals. 351 *n.*

Crossing. Statutory signal: failure to give, when train was running at high rate of speed and not upon regular time, is to be considered in deciding question of negligence and contributory negligence. Omaha, etc., R. Co. *v.* O'Donnell (Neb.). 346.

Crossing. Where signal is required. 350 *n.*

Crossing. Whether signals are necessary is a question of fact. 351 *n.*

Ordinance. Evidence. Ordinance limiting speed and requiring signals is properly admitted in evidence where track-repairer is injured within limits of city. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Statutory signal: failure to give. Except in case of sudden emergency, fact that engineer was otherwise engaged and did not give statutory signal is no justification to company. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

SLANDER AND LIBEL. See LIBEL.

SPECIAL FINDINGS. See PLEADING AND PRACTICE.

SPEED. See ANIMALS.

Crossing. Absence of flagman. Where statute prohibits running of train at greater speed than certain rate, unless flagman and gate is maintained, fact that gate has been left open and unattended gives right to expect that train will not pass at greater speed than ordinary rate, besides being evidence that train is not expected. State *v.* Boston & M. R. Co. (Me.). 356.

Crossing. Excessive speed. Where speed at particular place is limited to six miles an hour, refusal to instruct that speed was not proximate cause of accident, when, if it had not been for excessive speed, train would not have been near crossing when deceased attempted to cross, *held*, proper. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Crossing. Prohibited rate. City ordinance. 362 *n.*

STATIONS. See FENCES.

Approaches to depot. 486 *n.*

Blowing off steam. Frightening horses. Parties leaving station, in carriage, were injured through horses being frightened by sound of locomotive blowing off steam. Company held not liable, there being no evidence of obligation on their part to screen railroad from road. Simkins *v.* London, etc., R. Co. (Eng.). 487.

Care required of railroad companies as to their depot grounds. 482 *n.*

Construction. Statutory regulation. When railroad can be compelled to construct and maintain depot under Illinois statute providing that railroads shall maintain depots where it is in the habit of receiving passengers and freight at all towns having a population of 500 or more. People *v.* Chicago, etc., R. Co. (Ill.). 462.

Dangerous place. Contributory negligence. Plaintiff, after leaving ticket office, was cautioned to "look out for the steps." By crossing platform obliquely he missed the steps and sustained injury. *Held*, that question of contributory negligence was for jury. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Defective depot grounds. Stepping into hole. 482 *n.*

Hole in depot grounds. *Held*, not error to admit evidence of civil engineer that hole was in dangerous place and needed protection. Cross *v.* Lake Shore, etc.. R. Co. (Mich.) 476.

Hole in depot grounds near recognized way so near that person travelling at night fell into the hole. Company held liable for injury where plaintiff excised proper care. Cross *v.* Lake Shore, etc., R. Co. (Mich.). 476.

Light: duty as to. Railroad company must see that station is safe and should cause it to be lighted at proper time before arrival and after departure of trains. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Light. Duty of railroad company to light station. 476 *n.*

Light. Exemplary damages; neglect to sufficiently light depot is not such negligence on part of company as to entitle party injured to. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Obligation to construct. In absence of charter or statutory provisions, railroad cannot be compelled to construct depot at points where it is in the habit of receiving and discharging passengers and freight. People *v.* Chicago, etc., R. Co. (Ill.). 462.

Passage to and from railroad trains. Duty of company. 482 *n.*

Railroad depot. Power to compel erection. 464 *n.*

"Regular station." Place where there has never been any agent but where trains sometimes stop, *held*, not "regular station" within meaning of North Carolina Code imposing penalty for receiving freight at any regular depot, station, wharf, etc. Kellogg *v.* Suffolk, etc., R. Co. (N. Car.). 529.

Northwestern R. Co., being a common carrier engaged in the transportation of live-stock and accustomed to furnish cars for all live-stock offered, was notified by the plaintiffs, Volney Ayres and George Hagenah, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep, at its station at La Valle, and three at its station at Reedsburg, ready for loading, on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, nothwithstanding it was able and might reasonably have done so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1700. The answer, in effect, admitted the defendant's incorporation with the privileges alleged; "that it was at times engaged in the transportation over its roads, of live-stock, when, and if it was, able to do so, and was accustomed to furnish suitable cars therefor upon reasonable notice when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable despatch, but only upon special contracts at the time entered into between the shipper and this defendant, and upon such terms and conditions as should be agreed upon in writing; that one of the lines of this defendant railway is located as in said amended complaint stated." The answer also, in effect, alleged that "within a reasonable time, and as soon as it reasonably could, and as soon as it was within its power to do so" after the application of the plaintiffs for such cars, the defendant "forwarded four suitable and empty cars to La Valle" and "three suitable and empty cars to Reedsburg," which cars were severally forwarded with reasonable despatch, and arrived in due course, and as soon as they could with reasonable despatch be forwarded over its line; that at the times of such respective shipments the plaintiffs entered into an agreement in writing with the defendant for the transportation of said stock at special rates, and in consideration thereof it was agreed that the defendant should not be liable for loss from the delay of trains not caused by the defendant's negligence. At the close of the trial the jury returned a special verdict to the effect: (1) That, at the times named, the plaintiffs were copartners at Reedsburg, engaged in buying, and shipping live-stock to the Chicago market for sale; (2) that, at the times stated, the defendant was a common carrier, and as such, engaged in the transportation of live-stock and accustomed to furnish cars for and transport all live-stock offered for that purpose; (3) that one of its lines run from La Valle and Reedsburg to Chicago; (4) that, October 13, 1882, the plaintiffs, being fully apprised of the state of the

STATUTORY PROVISIONS CITED AND CONSTRUED—*Cont.*

Dakota.

Code of Civil Proc., sec. 679. Killing stock. 205.
Code of Civil Proc., sec. 680. Killing stock. Appraisement. 206.

Delaware.

Act of Feb. 22, 1877. Act of incorporated purchasers of Wilmington & Reading R. Co. 91.

England.

Railway and Canal Traffic Act 1854, sec. 2. Carriers. Undue prejudice and advantage: subjecting shipper to. 538, 539.
Railway and Canal Traffic Act 1854, sec. 6. Proceedings under the act. 540.
Regulation of Railways Act 1873, sec. 6. Jurisdiction of railway commissioners. 537.
6 Anne, ch. 31, secs. 6, 7. Fire: liability for. 215.
14 George III., ch. 78, sec. 86. Fire: liability for. 215, 218, 227, 228, 230.

Georgia.

Act of Oct. 14, 1879. Appointment of railroad commissioners. Regulation of rates. 514.
Code, sec. 2084. Connecting lines. Extra-terminal liability. 604, 605.
Laws of 1833, 256. Incorporation of Georgia R. Co. 512.
Laws of 1879, 125. Regulation of passenger and freight tariffs. 513.

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Directing verdict. It is proper for U. S. circuit court to direct verdict for plaintiff where no matter affecting his claim is left in doubt, aud all evidence clearly shows he is entitled to recover. Northern Pennsylvania R. Co. *v.* Commercial Bank (U. S.). 556.

Interstate Commerce Act. Federal courts can have no jurisdiction over civil actions for violation of, without regard to diverse citizenship, action must be brought in district of which defendant is an inhabitant. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

Jurisdiction of federal court over railroad corporation does not depend on diverse citizenship of party. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

Railroad in another state. Mere fact that a road has an office in district, will not give federal court jurisdiction, where all of road and principal place of business are outside of district. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

WAREHOUSEMAN.

Failure to deliver goods, Fire. Where goods are allowed tod remain at depot until company becomes liable only as warehouseman, and afterwards owner demands goods, and he is informed that they have not arrived, and afterwards depot is burned, failure to deliver goods on demand of owner is such negligence as renders company liable for their value. Union Pac. R. Co. *v.* Moyer (Kan.). 615.

Lease. Loss of freight burned at depot: liability for cannot be avoided by company under plea that its road was leased to other company who owned depot. International, etc., R. Co. *v.* Moody (Tex.). 607.

Limiting liability. Evidence. Receipt in contract limiting liability of carrier in transportation of goods and liability as carrier on safe arrival at destination, *held* inadmissible and immaterial, where goods are permitted to remain at destination until carrier becomes liable only as warehouseman, and afterwards are destroyed. Union Pac. R. Co. *v.* Moyer (Kan.) 615.

Loss. Proximate cause. 610 *n.*

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a competitive terminal point, and therefore exempt from the provisions of section 1443, Gen. Stat., by the terms of the proviso to said section; and, second, that the State railroad commission had no jurisdiction of the matter, inasmuch as it involved interstate commerce. These defences were overruled by the railroad commission, and the defendant was required to correct its rates and to refund the excessive charges. From this judgment, the defendant appealed to the circuit judge of the Fourth circuit, who, after full testimony upon the question whether Bennettsville was a competitive terminal point, sustained defendant's appeal upon both the grounds taken; holding that Bennettsville, being a competitive terminal point, was exempt from the operation of section 1443, Gen. Stat., and also that the matter involved was interstate commerce, and therefore beyond the jurisdiction of the State railroad commission. He consequently decreed and adjudged that the judgment of the commission be reversed. From this decree and judgment, the plaintiff has appealed to this court, assigning error to the circuit judge in overruling the two grounds upon which the judgment of the commission was based.

We will take up these grounds in the inverse order in which they were discussed by the circuit judge. And, first, did the railroad commission have jurisdiction? or did the matter involve and belong to interstate commerce, thereby depriving the state commission of jurisdiction? The word "commerce" is a term of broad signification. It embraces considerably more than the mere bargain and sale of goods and merchandise and other property between individuals. Yes, it includes all the instruments by which it may be conducted. It embraces transportation by railroads, steam-boats, ferries, etc., and all common carriers. It may be carried on between individuals in the same state, or over railroads lying in the same state. It is then internal commerce, and is under the control of state legislation. Or it may be conducted and engaged in between individuals living in different states, or transported over railroads lying in and running through different states. It is then interstate commerce, and its regulation belongs to congress. Now, here was a purchase by the plaintiff, a citizen of South Carolina, of a ton of commercial fertilizer, from a citizen in Charleston, both of the same state. Thus far, this transaction belonged to internal or domestic commerce, and would be subject to state control, if any. But the plaintiff lived at Tatum, in Marlboro county, some distance from Charleston, and to reach him his fertilizer had to be transported by railroads to him; and, as it turns out, by railroads, some entirely in South Carolina, some in North Carolina, and others partly in both. Now, while it is admitted that our state

Traffic constituted interstate commerce.


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thereon would be subject to the supervision of the commission if the charges complained of had been made there, and partly on roads over which the commission has no jurisdiction. The charges complained of arising on settlement with one of these last roads, the judgment of the circuit judge is sustained upon the ground that the railroad commission was without jurisdiction. Having reached the conclusion above, it is needless to discuss or adjudicate the other question as to whether Bennettsville is a competitive terminal point in the sense of the proviso to section 1443, and therefore exempt from said section. In fact, if the commission had no jurisdiction, the case was not properly before that commission, and the question suggested could neither have arisen before it, nor have been legally considered by it. We do not regard said question as before us. We therefore pronounce no judgment thereon. It is the judgment of this court that the judgment of the circuit judge be affirmed upon the ground hereinabove given.

McIVER and MCGOWAN, JJ., concur.

What Constitutes Interstate Commerce.—See *Ex parte* Koehler, 30 Am. & Eng. R. R. Cas. 71; Wabash, etc., R. Co. *v.* People, 26 Am. & Eng. R. R. Cas. 1; *Ex parte* Koehler 21 Ib. 52; *Ex parte* Koehler, 29 Ib. 44.

CONNOR *et al.*

v.

VICKSBURG AND MERIDIAN R. CO.

(*U. S. Circuit Court, E. D. Missouri, Oct.* 5, 1888.)

Courts—Jurisdiction of Federal Courts—Citizenship.—The Federal courts have jurisdiction over civil actions for the violation of the Interstate Commerce Act, without regard to the diverse citizenship of the parties; and, therefore, such an action can be brought only in the district of which the defendant is an "inhabitant" within the meaning of the act of March 3, 1887.

Same—Corporations—Citizenship.—For the purpose of determining the jurisdiction of the Federal courts, a corporation is to be considered a citizen of the state which created it and where its chief office and place of business is located.

Same—Railroad in Another State.—The question of the jurisdiction of a Federal court over a railroad corporation does not depend on the diverse citizenship of the party, and the mere fact that defendant has an office and an agent within the district, for the purpose of making freight con-

tracts, will not give the court jurisdiction, where all of defendant's road, and its principal office and place of business, are within the state which created it, altogether outside of the district.

ON motion to dismiss an action for the violation of the Interstate Commerce Act for the want of jurisdiction.

The petition states that the plaintiffs are citizens of Missouri, engaged in the shipment of grain to Mississippi, Alabama, and other southern States; that defendant is a railroad corporation created under the laws of Mississippi and having its principal office in that State; that defendant also has an office and agent in St. Louis, Missouri, for the transaction of its business as a common carrier; that defendant is a common carrier engaged in the transportation of property, under a common control, management, or arrangement for a continuous carriage or shipment from one State of the United States to other States of the United States, etc., within the meaning and purview of the Act of Congress of April 5, 1887, known as the Interstate Commerce Act, and that defendant is subject to the provisions of that act; and that being such common carrier, so engaged in the transportation of property, defendant, by an unlawful system of rebates, drawbacks, false bills of lading, and other false and fraudulent devices and discriminations against plaintiffs, instituted and put in force and practised by defendant, in violation of said act of congress, has damaged plaintiffs $50,000; wherefore they sue.

Process in the suit was returned as served upon the agent of the defendant at St. Louis.

The grounds of the motion to dismiss are stated in the opinion.

Pollard & Werner for defendant for the motion.

Minor Meriwether and *Henry W. Bond* for plaintiffs, *contra.*

THAYER, D. J.—In this case plaintiffs are citizens of Missouri, and the defendant is a corporation created by the laws of the State of Mississippi, and has its chief office and place of business in that State. The petition avers that defendant also has an office in the city of St. Louis, and has an agent in this city for the transaction of its business. Process has been served on the alleged agent, in accordance with the laws of Missouri regulating service upon foreign corporations. **Case stated.**

Defendant appears specially and moves to set aside the marshal's return of service, and to dismiss the suit on two grounds: (1) because the petition shows that the cause of action is of such character that defendant can only be sued thereon in a Federal court, in the district where it was incorporated and has its chief office,—that is, in Mississippi; (2) because (as it is claimed) the

person on whom process was served was not its agent at the time of service.

An objection is raised to any consideration of the first point of the motion, for the reason that it is not raised by demurrer. With reference to that objection it is only necessary to say that where it is claimed that a petition shows on its face that the court is without jurisdiction of the cause, I can conceive of no substantial reason why the defendant should not be permitted to move a dismissal of the same on that ground. In such case it is, in my opinion, wholly immaterial whether the jurisdictional question is raised by demurrer or by motion to dismiss.

I accordingly proceed to consider whether the first point of the motion is well taken.

Jurisdiction of Federal courts—Citizenship.

Section 1 of the act of March 3, 1887, regulating the jurisdiction of Federal courts, provides that "no civil suit shall be brought before either of said courts (district or circuit) against any person . . . in any other district than that whereof he is an inhabitant; but, where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the present case it is obvious that the jurisdiction of this court (if it has jurisdiction) does not depend "only on the fact" that plaintiff and defendant are citizens of different States.

The action is brought to recover damages sustained by reason of violations of an Act of Congress approved February 4, 1887 (21 U. S. Stat. at L. p. 379), commonly called the "Interstate Commerce Law."

The petition is drawn with especial reference to the provisions of that law, and states a cause of action over which the Federal courts are expressly given jurisdiction by § 9 of the act, without reference to the citizenship of the parties.

It has been suggested that the petition states a cause of action at common law as well as under the statute; but it is unnecessary to determine that question on this motion, for even if the acts complained of do give a right of action at common law, it is also true that they amount to a violation of the Interstate Commerce Act; and the Federal courts have been given jurisdiction of suits brought to recover damages growing out of violations of that act, without reference to the citizenship of the parties litigant. See § 9, *supra*.

In any view of the case made by the petition, it is clear that the jurisdiction of this court is not dependent "only on the fact" of diverse citizenship; therefore if jurisdiction of the cause is retained, it must be on the ground that the defendant

is an inhabitant of this district, within the meaning of the act of March 3, 1887.

For the purpose of determining whether defendant is an inhabitant of the district, I shall assume that the averments of the petition are true; that is, that it keeps an office and an agent in this district for the purpose of making freight contracts, but that its chief office as well as its railroad is located in the State of Mississippi.

Defendant an inhabitant of Mississippi district.

Does the fact, then, that it has an office and an agent here constitute it an inhabitant of the district?

This precise question, for reasons that appear to me to be sound, has been decided in the negative by the circuit court of the United States for the southern district of New York and northern district of Illinois. Halstead *v.* Manning, 34 Fed. Rep. 565; Gormully *v.* Pope Mfg. Co., Id. 818. See also Reinstadler *v.* Reeves, 33 Fed. Rep. 308.

It has long been the settled rule that a corporation created by a certain State, by virtue of that fact, is to be deemed a citizen of that State for the purpose of determining questions of Federal jurisdiction dependent on citizenship.

For the same reason that entitles it to be regarded as a citizen of the State that creates it, it may also be said to be an inhabitant of such State,—especially if (as in this case) its chief office and place of business is there located.

In one case at least a corporation has been termed an inhabitant as well as a citizen of the State under whose laws it was incorporated. Thus in the case of Louisville, C. & C. R. Co. *v.* Letson, 43 U. S. 2 How. 556 (11 L. ed. 377), the court says: "A corporation created by a State . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State."

If an artificial person, like a corporation, may be an inhabitant of a State or district, it can, with most propriety, be said to be an inhabitant of the State that created it, or of the State where it keeps its records and principal office, and where its chief officers reside or may most usually be found.

These, in my judgment, are the tests which should determine the domicile of a corporation; and, tried by such tests, the defendant is clearly an inhabitant of the district of Mississippi.

No other rule, indeed, seems to be applicable to the determination of the question of domicile, unless it be held that a corporation is an inhabitant of any and every State where it has an office and transacts business.

But if the latter position be assumed, no reason is perceived why it might not, with as good reason, be held that a corpora-

tion is likewise a citizen of each State where it maintains an office and transacts business. That, however, is a doctrine at variance with all of the decisions respecting the citizenship of corporations.

On the assumption that the defendant has an office and agent in this State, it goes without saying, that it might have been sued in this district under the act of March 3, 1875, to determine the jurisdiction of United States courts, as that act permitted suits to be brought against a defendant, not only in the district of his residence, but wherever he might "be found at the time of serving . . . process." These latter words, permitting service where defendant may be found, have been dropped in the amendatory act of March 3, 1887, for the manifest purpose of requiring all suits to be brought in the district of defendant's residence, excepting those suits only in which jurisdiction is dependent solely on the fact of diverse citizenship.

The authorities cited by plaintiff's counsel in opposition to the motion (being all decisions under the act of March 3, 1875) are therefore not in point.

The motion to dismiss the suit for want of jurisdiction over the person of the defendant (it being an inhabitant of the district of Mississippi) is therefore sustained, and the suit is dismissed.

Corporation—Citizenship.—For a full discussion of the question of residence and citizenship of corporations, see *ante*, Woodward *v.* Com., 498, and note, 507, 508; Pembina Consolidated Mining Co. *v.* Pennsylvania, 125 U. S. 181; s. c., 22 Am. & Eng. Corp. Cas. 546 and note. It is said in the case of Fales *v.* Chicago, M. & St. P. R. Co., 32 Fed. Rep. 673, that corporations are citizens and residences of the state under the laws of which they were created, and they cannot by engaging in business in another state acquire a residence there. Western Union Tel. Co. *v.* Dickinson, 40 Ind. 444; Barney *v.* Globe Bank, 5 Blatchf. C. C. 107; Bliven *v.* New Eng. Screw Co., 3 Blatchf. C. C. 111; Oakey *v.* Vicksburg C. & R. Bank, 14 Pa. 515; Rosenfeld *v.* Adams Exp. Co., 21 La. An. 233; Stanley *v.* Chicago, R. I. & P. R. Co., 62 Mo. 508; Herryford *v.* Ætna Ins. Co., 42 Mo. 148; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1; Denniston *v.* New York & N. H. R. Co., 1 Hilt. (N. Y.) 62; Fargo *v.* McVicker, 38 How. (N. Y.) Pr. 1; Shelby *v.* Hoffman, 7 Ohio St. 450; Wheeden *v.* Camden & A. R. Co., 4 Am. L. Reg. 296; Baltimore & O. R. Co. *v.* Koontz, 104 U. S. (14 Otto) 5; bk. 26, L. ed. 643; Muller *v.* Dows, 98 U. S. 444; bk. 24, L. ed. 207; United States Bank *v.* Deveaux, 9 U. S. (5 Cr.) 61; bk. 3, L. ed. 38; Hope Ins. Co. *v.* Boardman, 9 U. S. (5 Cr.) 57; bk. 3, L. ed. 36; Covington D. Co. *v.* Shepherd, 61 U. S. (20 How.) 227; bk. 15, L. ed. 896; Lafayette Ins. Co. *v.* French, 59 U. S. (18 How.) 404; bk. 15, L. ed. 451; Marshall *v.* Baltimore & O. R. Co., 57 U. S. (16 How.) 314; bk. 14, L. ed. 953; Rundle *v.* Delaware & R. Co., 55 U. S. (14 How.) 80; bk. 14, L. ed. 335; Louisville, C. & C. R. Co. *v.* Letson, 43 U. S. (2 How.) 497; bk. 11, L. ed. 353; Commercial & R. Bank *v.* Slocomb, 39 U. S. (14 Pet.) 60; bk. 10, L. ed. 354; Augusta Bank *v.* Earle, 38 U. S. (13 Pet.) 519; bk. 10, L. ed. 274; Beaston *v.* Farmers' Bank, 37 U. S. (12 Pet.) 102; bk. 9, L. ed. 1017; Chicago & N. W. R. Co. *v.* Whitton, 80 U. S. (13 Wall.) 270; bk. 20,

L. ed. 571; St. Louis *v.* Wiggins Ferry Co., 78 U. S. (11 Wall.) 423; bk. 20, L. ed. 192; United States Bank *v.* Planters' Bank, 22 U. S. (9 Wheat.) 910; bk. 6, L. ed. 245; Bonaparte *v.* Camden & A. R. Co., 1 Baldw. C. C. 205; Greeley *v.* Smith, 3 Story C. C. 76; Farnum *v.* Blackston Canal Co., 1 Sumn. C. C. 46; Barclay *v.* Levee Com., 1 Woods C. C. 254.

And this is true irrespective of the individual citizenship of the members constituting the corporation. See Baltimore & O. R. Co. *v.* Cary, 28 Ohio St. 208; Quigley *v.* Central Pac. R. Co., 11 Nev. 350; Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544; Ohio & M. R. Co. *v.* Wheeler, 66 U. S. (1 Black) 286; bk. 17, L. ed. 130; Baltimore & O. R. Co. *v.* Harris, 79 U. S. (12 Wall.) 65; bk. 20, L. ed. 354; Hatch *v.* Chicago, R. I. & P. R. Co., 6 Blatchf. C. C. 105; Pomeroy *v.* New York & N. H. R. Co., 4 Blatchf. C. C. 120; Minnett *v.* Milwaukee & St. P. R. Co., 3 Dill. C. C. 460; Farmers' L. & T. Co. *v.* Maquillan, 3 Dill. C. C. 379.

Same—Jurisdiction of Federal Courts.—As to jurisdiction "citizenship" means simply residence. Shelton *v.* Tiffan, 47 U. S. (6 How.) 162; bk. 12, L. ed. 387; Gassies *v.* Ballan, 31 U. S. (6 Pet.) 761; bk. 8, L. ed. 573. Butler *v.* Farnsworth, 4 Wash. C. C. 101; Cooper *v.* Galbraith, 3 Wash. C. C. 546. The residence of a corporation is where it exercises its franchise, engages in the prosecution of its corporate enterprise, and transacts its business. Bristol *v.* Chicago & A. R. Co., 15 Ill. 436; Day *v.* Newark I. R. Mfg. Co., 1 Blatckf. (Ind.) 628; Gill *v.* Kentucky & C. G. & S. Min. Co., 7 Bush (Ky.), 635; Baltimore & O. R. Co. *v.* Glenn, 28 Md. 287; New Orleans J. & G. N. R. Co. *v.* Wallace, 50 Miss. 244; Ormsby *v.* Vermont C. Min. Co., 56 N. Y. 623; Hubbard *v.* National Prot. Ins. Co., 11 How. (N. Y.) Pr. 149; Conroe *v.* National Prot. Co., 10 How. (N. Y.) Pr. 403; Glaize *v.* South Carolina R. Co., 1 Strobh. (S. C.) L. 70; Cowardin *v.* Universal L. Ins. Co. 32 Gratt. (Va.) 445; Louisville C. & C. R. Co. *v.* Letson, 43 U. S. (2 How.) 497; bk. 11, L. ed. 353; United States Bank *v.* McKenzie, 2 Brock C. C. 393; without regard to the citizenship of the individual composing it. Western Un. Tel. Co. *v.* Dickinson, 40 Ind. 444; Rosenfeld *v.* Adams Exp. Co., 21 La. An. 233; Oakey *v.* Bank, 14 La. An. 515; Stanley *v.* Chicago R. I. & P. R. Co., 62 Mo. 508; Quigley *v.* Central R. Co., 11 Nev. 350; Shaft *v.* Phœnix L. Ins. Co., 67 N. Y. 514; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1; Fargo *v.* McVicker, 38 How. (N. Y.) Pr. 1; Baltimore & O. R. R. Co. *v.* Cary, 28 Ohio St. 208; Shelby *v.* Hoffman, 7 Ohio St. 50; Ohio & M. R. R. Co. *v.* Wheeler, 66 U. S. (1 Black) 286; bk. 17, L. ed. 130; Bank of United States *v.* Devaux, 9 U. S. (5 Cr.) 57; bk. 3, L. ed. 38; Hope Ins. Co. *v.* Boardman, 9 U. S. (5 Cr.) 57; bk. 3, L. ed. 36; Covington Drawbridge Co. *v.* Shepherd, 61 U. S. (20 How.) 227; bk. 15, L. ed. 896; Lafayette Ins. Co. *v.* French, 59 U. S. (18 How.) 404; bk. 15, L. ed. 451; Marshall *v.* Baltimore & O. R. Co., 57 U. S. (16 How.) 314; bk. 14, L. ed. 953; Rundle *v.* Delaware & R. Can. Co., 55 U. S. (14 How.) 80; bk. 14, L. ed. 335; Louisville C. & C. R. Co. *v.* Letson 43 U. S. (2 How.) 497; bk. 11, L. ed, 353; Bank *v.* Slocomb, 39 U. S. (14 Pet.) 60; bk. 10, L. ed. 354; Chicago & N. W. R, Co. *v.* Whitton, 80 U. S. (13 Wall.) 270; bk. 20, L. ed. 571; Bonaparte *v.* Camden & A. R. Co., Bald. C. C. 205; Minnett *v.* Milwaukee & St. P. R. R. Co., 3 Dill. C. C. 460; Trust Farmers' L. Ins. Co. *v.* Maquillan, 3 Dill. C. C, 379; Greeley *v.* Smith, 32 Story C. C. 76; Barclay *v.* Com., 1 Woods C. C. 254; Wheedon *v.* Camden & A. R. R. Co., 4 Am. L. Reg. 216; Hatch *v.* Chicago R. I. & P. R. Co., 6 Blatchf. C. C. 105; Barney *v.* Globe Bank, 5 Blatchf. C. C. 107; Pomeroy *v.* New York & N. H. R. R. Co., 4 Blatchf. C. C. 120; Bliven *v.* New England Screw Co., 3 Blatchf. C. C. 111.

In those cases where a Federal court can take jurisdiction of controversy between citizens, it will take jurisdiction not alone of controversy between citizens and corporation or between corporations. See Kansas

Pac. R. Co. *v.* Atchison, T. & S. F. R. Co., 112 U. S. 414; bk. 28, L. ed. 794; Munner *v.* Daws, 94 U. S. 446; bk. 24 L. ed. 207; Chicago & N. W. R. Co. *v.* Whitton, 88 U. S. (13 Wall.) 270; bk. 20, L. ed. 571; United States Bank *v.* Deveaux, 9 U. S. (5 Cr.) 61; bk. 3 L. ed. 38; Fales Adm. *v.* Chicago M. & St. P. R. Co., 32 Fed. Rep. 673; Chicago N. W. R. Co. *v.* Chicago & St. P. R. Co., 6 Biss. C. C. 219; Parsons *v.* Greenville C. R. Co., 1 Hughes C. C. 279; Culbertson *v.* Wabash Nav. Co., 4 McL. C. C. 544; Nesmith *v.* Calvert, 1 Woodb. & M. C. C. 34; Vose *v.* Reed, 1 Wood's C. C. 647.

In the case of Fales *v.* Chicago M. & St. P. R. Co., 32 Fed. Rep. 673, it is said that the provisions of the act of congress of March 3, 1887, sec. 1, regarding the place of bringing suit by original process in the circuit courts of the United States, do not apply in determining the question of jurisdiction on an application for removal of causes from the state courts.

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NOTE.—The mode of citing the American and English Railroad Cases is as follows:

85 Am. & Eng. R. R. Cas.

The index contains references to the decisions and to the notes. References to the decisions are to the pages upon which the cases begin. References to the notes are to the pages upon which the propositions stated in the index are found. Reference to Constitutional or Statutory Provisions are to the pages upon which they are cited.

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BILL OF LADING.

Delivery of goods. A railroad company has no right to make a delivery of freight otherwise than in strict accordance with bill of lading. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Delivery of goods. Custom. Fact that railroad previously delivered freight shipped to order of consignor to third party before acceptance of draft, such draft, however, having always been paid, will not justify finding that there was course of dealing, which would take the case out of the rule as to proper delivery. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Delivery of goods. Usage. Railroad delivering cattle, consigned to shipper, to party whom it is directed merely to notify, *held* liable to bank discounting consignor's draft to such person. Fact that it was customary to so deliver shipments between same parties *held* no defence. Northern Pennsylvania R. Co. *v.* Commercial Bank (U. S.). 556.

Delivery of goods. Where goods are shipped to order of consignor, railroad is not justified in delivering them to third person without bill of lading, and merely on production of invoice and letter giving him notice of draft. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Delivery of goods without presenting bill. Custom. 554 *n.*

Duplicates. Loss. Proof of contents. Where duplicate part of bill was attached to draft drawn on plaintiff and paid by him, there was presumption that it was in his possession; and although loss of other duplicate was proved, plaintiff could not prove its contents by parol, until after excusing non-production of part attached to draft. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Loss. Proof of contents. Where bill of lading has been executed in duplicate parol proof of contents is incompetent until after satisfactory excuse for non-production of both parts. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Ownership of goods. Bills of lading are symbols of property, and when properly indorsed operate as delivery of property itself, investing indorsees with constructive custody, which serves all the purposes of an actual possesion. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Ownership of goods. Where bill of lading requires freight to be delivered to order of consignor, mailing the bill unindorsed and attached to draft upon third person does not raise conclusive presumption that third person is thereby invested with title, and it may be shown that vendor intended to retain title until draft was paid. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Ownership of property. 554 *n.*

BONDS. See DISSOLUTION; MORTGAGE.

Income. Mortgage bonds. Absorption of earnings. Terms of mortgage and bonds *held* to preclude directors from exercising power of leasing road upon terms which render lessee responsible for mortgages, and fact that lease would reduce amount available for payment of coupons does not constitute breach of contract with bondholders. Day *v.* Ogdensburgh, etc., R. Co. (N. Y.). 102.

BOYCOTTS. See CARRIERS.

BRANCH ROADS.

Carrier. Operating road. Instruction that if railroad company operated branch road, whether it had a right to construct it or not, it will become a common carrier thereon, *held* erroneous. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

BRANCH ROADS—*Continued.*

Carriers. Railroad having power to construct branches becomes a carrier as to such branches when such branches are constructed for purposes of general transportation; question whether such branches have been used for general transportation is for jury. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

Purchase. Statute authorizing company to locate, construct, and operate a branch line does not confer power to purchase line already constructed. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

BRIDGE.

Highway crossing. Bridging street. Special act authorizing company to construct branch lines and requiring city to build approaches to street bridges construed as not applicable. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Highway crossing. Cost. Apportionment. In proceedings against two companies to compel construction of bridge over tracks, each company was properly required to construct those parts above their own tracks and approaches upon their own sides without other apportionment. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Highway crossing. Duty of company to construct bridges and footways. 261 *n.*

Highway crossing. Fact that road has once been constructed at grade does not exempt it from bridging when that becomes necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Highway crossing. *Mandamus.* Necessity of works by another company *held* not a fatal objection to *mandamus* proceedings against defendant. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Highway crossing. *Mandamus.* Where *mandamus* proceedings were pending against two companies to compel them to bridge their tracks, and the roads were near together, so that bridges should be made continuous over all the tracks, *held*, not error to require both causes to be tried together. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Highway crossing. Necessity. In view of necessity that bridges be built over tracks of two railroads if over either, evidence *held* admissible as to extent of use of crossing by the other company showing necessity for bridge. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Highway crossing. Restoring street. Charter of company construed as imposing continuous duty as to restoring public streets by bridging or otherwise when necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

CARRIERS. See PASSENGERS: STATIONS.

Act of God. Company which has agreed to transport cattle on certain day cannot plead act of God, which takes place after such day, as defence to action for damages for breach of contract. Gulf, etc., R. Co. *v.* McCorquodale (Tex.). 653.

Act of God. Earthquake. Railroad is not liable for damages caused by injury to freight brought about by earthquake, and without negligence on part of company. Slater *v.* South Carolina R. Co. (S. Car.). 625.

Act of God; upon facts proved, *held*, that loss was not caused by, and that plaintiff was liable for loss. Chicago, etc., R. Co. *v.* Manning (Neb.). 618.

Action for charges. Counter-claim and set-off. In action by railway to recover charges for carrying goods, defendant cannot set off or recover by counter-claim over-payments in respect of previous charges which were unreasonable. Lancashire, etc., R. Co. *v.* Greenwood (Eng.). 537.

Action for charges. Unreasonableness. It is no defence to action by railway to recover charges that they were so unreasonable as to give undue preference or to subject defendant to undue prejudice within meaning of Railway and Canal Traffic Act. Lancashire, etc., R. Co. *v.* Greenwood (Eng.). 537.

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Action for penalty. Limitation. 536 *n.*

Bills of lading are symbols of property, and when properly indorsed operate as delivery of property itself. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Bill of lading. Delivery of goods. Railroad company has no right to make a delivery of freight otherwise than in strict accordance with bill of lading. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Bill of lading. Ownership of property. 554 *n.*

Condition of shipment. Waiver. Carrier has no right to demand of shipper a waiver of his right as condition precedent to his receiving freight. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Connecting lines. Advanced freight. Where company require shipper of freight consigned beyond terminus to advance charges for entire distance, it must so deliver goods to connecting carrier that latter would be under same obligation in reference to them which would have been upon it if goods had been received from consignor with advance payment. Palmer *v.* Chicago, etc., R. Co. (Conn.). 629.

Connecting lines. Agreement as to liability. 665 *n.*

Connecting lines. Agreements between. Liability. Where two roads agree that no freight shall be considered as delivered from one to another unless charges are prepaid, one cannot relieve itself from liability by placing car on track used by both companies and notifying through road thereof without payment or guarantee of charges. Palmer *v.* Chicago, etc., R. Co. (Conn.). 629.

Connecting lines. Construction of statute. Section of Georgia Code relating to responsibility of connecting roads where goods are transported over more than one of them, *held* to have no application unless declaration alleges that defendant received goods from its connecting line in good order, and there being no such allegation defendant might show that damage was done before it received the freight. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602.

Connecting lines. Contract to ship to destination shown by company receiving cotton destined to point beyond its own line without limiting its liability; and connecting carriers having no contract with plaintiff are not liable to him. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Connecting lines. Custody of goods. Delay. Despatch company having contracted to carry butter from Ontario to England, *held* to have made through contract of carriage, and to be liable to the shipper for damages sustained owing to delay in getting the butter aboard the steamship. Merchant's Despatch Trans. Co. *v.* Hately (Can.). 565.

Connecting lines. Defective cars. 664 *n.*

Connecting lines. Delay. Letters from agents. Railroad cannot introduce letters written to its agents by agents of connecting road regarding mistake in transporting freight received from such road causing delay. Waite *v.* New York, etc., R. Co. (N. Y.). 576.

Connecting lines: delivery to. Custom. Fact that company receiving cotton, put car on side road of defendant company according to custom and agreement existing between them, and defendant's agent reported car to accountant, does not raise presumption that defendant accepted car as carrier. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Connecting lines. Duty to receive freight and passengers from other roads. Strike of employees. 650 *n.*

Connecting lines. Exchange of cars. Boycotts. Carrier cannot refuse to receive cars from connecting lines although receiving of them might involve company in strike or boycott of employees. Biers *v.* Wabash, etc., R. Co. (C. C.). 646.

Connecting lines. Exchange of cars. Receiver is obliged to receive and transport freight cars and furnish accommodations to connecting lines to same extent as proper officers of railroad companies. Biers *v.* Wabash, etc., R. Co. (C. C.). 646.

CARRIERS—*Continued.*

Connecting lines. Injury to freight. Company sued for injury to through freight cannot defend on ground that it was not last road receiving goods where it was last road mentioned in through bill and received amount of freight from consignee. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602

Connecting lines. Liability to consignor. One company receiving freight from another is liable directly to consignor for any breach of contract between him and its connecting line, and is entitled to benefit of any exemption of liability. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Connecting lines. Loss of goods. 662 *n.*

Connecting lines: responsibility of carriers for negligence of. 663 *n.*

Connecting lines: wrongful delivery by. 664 *n.*

Contract of carriage: suit on. 672 *n.*

Delay. Damages. Consignee cannot recover damages for delay in the delivery of merchandise caused by depreciation in price, unless he shows that proceeds of consignment were less than purchase price. Haas *v.* Kansas City, etc., R. Co. (Ga.). 572.

Delay. Damages. Sale at fixed price. 575 *n.*

Delay. Evidence. Delays of connecting roads. 656 *n.*

Delay in delivery. Strike. Railroad is not liable for delay in delivering freight caused by strike of employees accompanied by violence which could not be suppressed. Haas *v.* Kansas City, etc., R. Co. (Ga.). 572.

Delay in transporting. 571 *n.* 579 *n.*

Delay in transporting freight caused by unusual press of business. 655 *n.*

Delay. Machinery shipped for special purposes. 579 *n.*

Delay. Measure of damages. 575 *n.*

Delay. Neglect to forward goods. 571 *n.*

Delay. Negligence. Company receiving car from connecting line containing through freight, and also boiler way-billed to point on its line, *held* guilty of negligence in sending such car beyond its line to destination of through freight without opening it to look for boiler. Waite *v.* New York, etc., R. Co. (N. Y.). 576.

Delay. Pleading. Evidence. In action for delay, if complaint states that delay was caused by negligence and answer denies negligence, and proof goes largely to question of negligence, exclusion from jury of question of express contract, and submitting case wholly on charge of negligence, cannot be objected to by defendant. Waite *v.* New York etc., R. Co. (N.Y.). 576.

Delay. Season of shipment. Evidence of conversation at time of contract. 656 *n.*

Delay. Strike. Riot and mob. 575 *n.*

Delay. Suit by consignee. Where contract of carriage is made with consignor consignee cannot sue for delay unless consignor has assigned to him bill of lading. Haas *v.* Kansas City, etc., R. Co. (Ga.). 572.

Delivery of goods. Custom. Fact that railroad had previously delivered freight shipped to order of consignor to third party before acceptance of draft, such draft, however, having always been paid, will not justify finding that there was course of dealing which would take the case out of the rule as to proper delivery. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Delivery of goods. Where goods are shipped to order of consignor railroad is not justified in delivering them to third person without bill of lading, and merely on production of invoice and letter giving him notice of draft. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Delivery without bill of lading. Usage. Railroad delivering cattle consigned to shipper to party whom it is directed merely to notify, *held* liable to bank discounting consignor's draft to such person. Fact that it was customary to so deliver shipments between same parties *held* no defence. Northern Pennsylvania R. Co. *v.* Commercial Bank (U. S.). 556.

Delivery of goods without presenting bill of lading. Custom. 554 *n.*

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Discrimination. Agreement to rebate. 528 *n.*
Discrimination. English Railway and Canal Traffic Act. 542 *n.*
Discrimination. In absence of statutory or charter regulations to the contrary, railroad may discriminate as to rates, provided no unreasonable charge is made; but no discrimination can be made in the right to ship. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Discrimination. Pleading. 536 *n.*
Discrimination. Pleading. Allegation that railroad directed agents to refuse to receive or transport any goods offered for transportation by the plaintiff except when prepaid, does not state cause of action if it fails to aver that agents have refused to receive or transport goods, and that he has actually been injured. Allen *v.* Cape Fear, etc., R. Co. (N. Car.). 532.
Discrimination. Preference. 528 *n.*
Duty of carrier receiving goods. 527 *n.*
Excessive charges. Jurisdiction of railroad commissioners. Oregon board of railroad commissioners *held* to have no jurisdiction to require railroad company to refund to shipper sum of money alleged to have been exacted in excess of reasonable charge. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.
Failure to deliver goods. Fire. Where goods are allowed to remain at depot until company becomes liable only as warehouseman, and afterwards owner demands goods and he is informed that they have not arrived, and afterward depot is burned, failure to deliver goods on demand of owner is such negligence as renders company liable for their value. Union Pac. R. Co. *v.* Moyer (Kan.). 615.
Failure to transport goods. Pleading. 531 *n.*
Fast freight line. Limiting liability. Transportation company not entitled to limit its liability by requiring that owner shall look to railroad over which property is shipped for damages. Block *v.* Merchants' Despatch Co. (Tenn.). 579.
Interstate commerce. Transportation from one state into another, or over connecting lines between two points within the same state where one of such connecting lines runs entirely in another state, is interstate commerce, of which the railroad commission can have no jurisdiction. Sternberger *v.* Cape Fear, etc., R. Co. (S. Car.). 693.
Jewelry. False statement of shipper. Company is exempt from liability for loss of jewelry, character of which is misrepresented by shipper, and which is shipped as household goods in order to obtain lower rate. Charleston, etc., R. Co. *v.* Moore (Ga.). 623.
Lease. Loss of freight burned at depot: liability for, cannot be avoided by company under plea that its road was leased to other company who owned depot. International, etc., R. Co. *v.* Moody (Tex.). 607.
Libel. Published order to servants. Instructions to servants of railroad not to ship for certain person except when freight charges are prepaid, and a request to connecting line to make similar order, is a privileged communication, and does not constitute libel in absence of express malice. Allen *v.* Cape Fear, etc., R. Co. (N. Car.). 532.
Limiting liability. Authorities arranged by states. 672 *n.*
Limiting liability. Bill of lading. Where carrier pleads stipulation exempting it from liability, instruction as to what is essential to constitute such a contract *held* immaterial after instruction that stipulation relied on is unreasonable and against public policy. Block *v.* Merchants' Despatch Co. (Tenn.). 579.
Limiting liability. Connecting line. *Lex loci contractus.* Company receiving freight from another company shipped in another state must, to claim exemption from liability, prove that stipulation making exemption was lawful in state where it was made. International, etc., R. Co. *v.* Moody (Tex.). 607.
Limiting liability. Contract of affreightment. Fact that shipper signed freight contract limiting carrier's liability under misapprehension of its

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contents, it having been executed in duplicate, one copy of which he retained, in absence of fraud by carrier, will not vitiate limitation after contract has been acted upon. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Limiting liability. Despatch company. Transportation company cannot limit its liability by requiring that owner shall look to railroad over which property is shipped. Despatch company is common carrier, and railroad over whose line it ships its freight is but its agent. Block *v.* Merchants' Despatch Co. (Tenn.). 579.

Limiting liability. Express companies. 496 *n.*

Limiting liability. How far carriers may limit their common-law liability by contract. 677 *n.*

Limiting liability. *Lex loci contractus.* Contract limiting liability for transportation of goods into Georgia from another state will be held valid by Georgia courts if it is lawful where it is made, although it would be void if made in Georgia. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602.

Limiting liability. Shipments of live stock. Reduced rates. 614 *n.*

Limiting liability. Specific sum. Stipulation that measure of damages for loss or injury to live stock should not exceed $50 per head when based upon consideration of reduction in rates maintained. St. Louis, etc., R. Co, *v.* Weakly (Ark.). 635.

Limiting liability. Stipulation as to damages. Carrier has no right to require, as condition precedent to receiving live stock, agreement that in case of loss, measure of damages shall not exceed cash value at place of shipment. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Limiting liability. Stipulation for notice. 678 *n.*

Limiting liability to specified sum. Company may stipulate for limitation to specified sum in case of total loss in consideration of deduction from regular rates. Louisville, etc., R. Co. *v.* Sherrod (Ala.). 611.

Limiting liability. Warehouseman. Evidence. Receipt in contract limiting liability of carrier *held* immaterial in action by owner to recover value of goods destroyed by fire after they arrived at destination and were permitted to remain until carrier became liable only as warehouseman. Union Pac. R. Co. *v.* Moyer (Kan.). 615.

Live stock. Act of God. Company which has agreed to transport cattle on certain day cannot plead act of God which takes place after such day as defence to action for damages for breach of contract. Gulf, etc., R. Co. *v.* McCorquodale (Tex.). 653.

Live stock: carriers of. Who are. Company engaged in business of transporting live stock holding itself out as such is a common carrier of live stock, with such limitations of its common-law liabilities as arise from habits, wants, vices, etc., of animals. Ayres *v.* Chicago, etc., R. Co. (Wis.). 679.

Live stock. Contributory negligence. Action for damages for injury to horse while being unloaded. What is considered as plea of contributory negligence requiring reply. Owen *v.* Louisville & N. R. Co. (Ky.). 687.

Live stock. Custom. Evidence to prove custom among railroads not to receive stock unless shipper agrees to hold company harmless for delays in taking up freight is incompetent. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Live stock. Damages. Where plaintiff's evidence showed contract of shipment to have been in writing, objections to questions asked him on cross-examination as to his agreement to provide for stock *held* properly sustained. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Live stock. Defective apparatus. Contributory negligence. Carrier must furnish safe means of unloading. Contributory negligence of owner having knowledge of unsafe platform, question for jury. Owen *v.* Louisville, etc., R. Co. (Ky.). 687.

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Live stock. Delay. Damages. Company sued for damages arising from delay is not liable for damages arising from delay, from Saturday to Monday, in sale of stock, where delivery was made at market in time for sale on Saturday. Ayres *v.* Chicago, etc., R. Co. (Wis.). 679.

Live stock. Delay. Damages. Where plaintiff seeks damages for breach of contract to transport cattle on certain day, defendant cannot show that depreciation in price was caused by failure of cattle to conform to standard, and not by delay in shipment. Gulf, etc., R. Co. *v.* McCorquodale (Tex.). 653.

Live stock. Delay in transportation. 686 *n.*

Live stock. Delay in transportation. Measure of damages. 686 *n.*

Live stock. Evidence. In action against company for loss of jack, declarations of tramp found in the car with the dead jack *held* inadmissible. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Live stock. Failure to furnish cars. Company has burden of proving inability to furnish cars at certain time as requested. Ayres *v.* Chicago, etc., R. Co. (Wis.). 679.

Live stock. Failure to furnish cars. Company requested to furnish cars for live stock at certain time must inform applicant whether it can furnish such cars, and if it fails to give such notice, shipper, relying upon its performance of its duty, may recover of company damages suffered by reason of failure to furnish cars. Ayres *v.* Chicago, etc., R. Co. (Wis.). 679.

Live stock. Injury. Burden of proof. Where shipper under contract limiting company's liability accompanies stock, and makes provision for it, he has the burden of showing that loss of stock resulted from negligence of company. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Live stock. Injuries. Damages. 671 *n.*

Live stock. Lack of cars. Company cannot excuse breach of contract to transport cattle on certain day by fact that it had no empty cars in which to receive cattle. Gulf, etc., R. Co. *v.* McCorquodale (Tex.). 653.

Live stock. Lack of cars. Evidence. Where company pleads as defence to breach of contract to transport cattle on certain day that it had no empty cars, plaintiff may show that empty cars were standing at place of shipment during time of delay. Gulf, etc., R. Co. *v.* McCorquodale (Tex.). 653.

Live stock. Loss. Measure of damages. Where cargo of horses consists of mares with foal, there is defect in freight and measure of damages for loss in price, less freight charges, which they would have brought at destination in condition which they would have been in had company exercised due care. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Live stock. Negligence in carriage. Damages. 687 *n.*

Live stock. Notice of claim of damages waived by company where agent has injured animal examined and returned. Owen *v.* Louisville, etc., R. Co. (Ky.). 687.

Live stock. Obligation of carrier. Where a railroad undertakes to carry live stock, it becomes subject to same conditions so far as condition of animals are concerned, as in case of other freight. Northern Pennsylvania R. Co. *v.* Commercial Bank (U. S.). 556.

Live stock. Stipulation as to damages. Carrier has no right to require, as condition precedent to receiving live stock, agreement that in case of loss measure of damages shall not exceed cash value at place of shipment. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Live stock. Unreasonable regulation. Requirement by company that shipper shall accompany stock, and provide for it at his own risk and expense, as condition to receiving such stock, is unreasonable, and defendant cannot prove such custom in order to avoid liability. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Loss of goods. Notice of claim. Condition in receipt requiring claim for loss to be presented within thirty days after receipt of package is reasonable. But

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if shortage in package was not discovered until after prescribed time, condition will not preclude recovery. Glenn *v.* Southern Ex. Co. (Tenn.). 627.

Machinery. Open cars. Where shipper agrees that machinery may be transferred on open cars, company is not liable for damage caused thereby in absence of its own negligence or unreasonable delay. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.). 602.

Mail. Carriage of U. S. mail. 511 *n.*

Mail: contract for carrying. United States statute giving Postmaster-General authority to deduct from pay of contractors price of trip where trip is not made, and not to exceed three times price of trip where failure is caused by fault of contractor, *held* not repealed. Chicago, etc., R. Co. *v.* United States (U. S.). 508.

Notice of claim for loss. Condition requiring shipper to give notice of claim to agent before removal of stock, cannot be shown to exist as to custom, it not being reasonable to require such notice where company has no agent at point of shipment upon whom notice can be served. Missouri Pac. R. Co. *v.* Fagan (Tex.). 666.

Rates. Charter contract. Charter of Georgia R. & B. Co. *held* not a contract between state and railroad that latter might charge whatever it choosed within certain prescribed limits, and company is subject to provisions of subsequent legislation providing for commissioners to regulate railroad tariffs. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Rates: charter restriction against regulation of. 518 *n.*

Rates. Constitutional law. State may prescribe rates to be charged by railroad company in absence of charter provision forbidding it, subject to limitation that carriage is not required without reward, or on conditions amounting to taking property without compensation, and that what is done does not amount to regulation of commerce. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Rates. Excessive charges. Provision in statute requiring commissioners to enter complaint in court of equity where its orders have been violated or neglected, *held* not to authorize such proceedings in order to enforce repayment of freight charges claimed to have been unreasonable. Board of R. Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Rates. Jurisdiction of railroad commissioners. Act creating railroad commissioners did not give board authority to adjust differences between railroad companies and shippers, although it was empowered to hear complaints. Board of Railroad Commrs. *v* Oregon R. & N. Co. (Ore.). 542.

Rates: power of legislature to regulate. 518 *n.*

Receiver: liability of, as common carrier. 8 *n.*

Receiver. Loss of goods. Goods lost in transit while road is operated by receiver not being carried under an undertaking by the corporation, the negligence causing the loss is not the negligence of the corporation, and an action will not lie against it. Kansas Pacific R. Co. *v.* Searle (Col.). 6.

Receiver of railroad company who controls its operation is no less common carrier because property of road is in custody of court. Biers *v.* Wabash, etc., R. Co. (C. C.). 646.

Refusal to carry. 528 *n.*

Refusal to carry. Exemplary damages: railroad is liable for, for refusal to carry goods, only in case of ill-will or malicious disregard for rights of another. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

Refusal to carry. Instruction that if railroad after refusing to carry for plaintiff carried for others freight that was received and discharged at private platform, plaintiff cannot recover, properly refused, as it presumes that position of carrier had been established, which is question for jury. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

Refused to carry. "Regular station." Place where there has never been any agent but, where trains sometimes stop, *held* not "regular station" within meaning of North Carolina Code imposing penalty for refusing to receive

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freight at any regular depot, station, wharf, etc. Kellogg *v.* Suffolk, etc., R. Co. (N. Car.). 529.
Valuation. Loss of goods. Statement made by shipper as to value. 624 *n.*
Who are. Branch roads. Instruction that if railroad company operated branch road, whether it had a right to construct it or not, it will become a common carrier thereon, *held* erroneous. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Branch roads. Question whether branch road constructed by railroad company has been used for general transportation so as to make company liable as carrier as to such branch is one of fact for jury. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Branch roads. Where railroad company is invested with power to construct branches, it will become a carrier as to such branches. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Cabmen, draymen, and porters. 495 *n.*
Who are. Common carrier is one who undertakes as a business for hire or reward to carry from one place to another for all who apply. Schloss *v.* Wood (Colo.). 492.
Who are. Evidence. Whether person is common carrier depends on whether he holds himself out as such. By engaging in business generally or by announcing it by advertising, etc., person may fix upon himself the liability of a common carrier. Schloss *v.* Wood (Colo.). 492.
Who are. Express companies. 496 *n.*
Who are. Ferrymen. 496 *n.*
Who are. Omnibus proprietors. 496 *n.*
Who are. Owners of steamboats, ships, vessels, canal-boats and tow-boats. 496 *n.*
Who are. Province of jury. Where parties receive merchandise at terminus of railroad and transport it to neighboring town, where they had office and where bills were collected, etc., *held*, a question for jury whether they were common carriers. Schloss *v.* Wood (Colo.). 492.
Who are. Question for jury. Question as to whether party is a common carrier is one of fact, and consequently for jury. Avinger *v.* South Carolina R. Co. (S. Car.). 519.
Who are. Railroad companies. 497 *n.*
Who are. Railroad is a common carrier, and is bound to carry for all persons all goods offered for transportation. Avinger *v.* South Carolina R. Co. (S. Car.) 519.
Who are. Stage-coach lines. 497 *n.*
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Contributory negligence. Capacity and degree of care; when a question for jury. 396 *n.*
Contributory negligence. Children so young as to be *non sui juris*. 395 *n.*
Contributory negligence. Child seven years of age or upwards is supposed to be capable of taking care of himself. 395 *n.*
Contributory negligence. Instruction. Where boy of eleven years was killed at crossing, instruction that jury should consider boy's age and discretion

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held erroneous and misleading. Erwin *v.* St. Louis, etc., R. Co. (Mo.). 390.

Contributory negligence of infants, 394 *n.*

Contributory negligence. Question of care to be required of a child is for jury. 395 *n.*

Contributory negligence. Whether children are *non sui juris*. When a matter of law. 395 *n.*

Infant plaintiffs. Next friend. The husband of their mother has no interest in suit by infant plaintiffs to recover for killing their father, and he may act in such suit as next friend. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Interest in deceased's life. Under South Carolina statute children of person killed may maintain action although at date of the killing all of the plaintiffs were adults, having no legal claim on deceased for support. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

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Citizenship of corporations. 700 *n.*

Jurisdiction of federal courts. 701 *n.*

Jurisdiction of federal courts: for purposes of determining, corporation is citizen of state which created it and where its chief office is. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

Jurisdiction of federal court over railroad does not depend on diverse citizenship of party. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

COASTING. See CROSSINGS.

COLLISION.

Collision at railroad crossing. Duty of engineer. 285 *n.*

Condition of engineer. In action for injuries to car by collision at railroad crossing it may be shown that defendant's engineer had been drinking. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Crossing Breach of contract. Action by company against another to recover damages for collision at crossing may be maintained under contract by which defendant company was to maintain crossing, and collision was caused by servants of defendant failing to obey signal. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Crossing. Damages. Evidence. In action for injury to car by collision at railroad crossing, testimony as to cost of repairing car and difference in value before and after injury is competent. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

COMMISSIONERS. See RAILROAD COMMISSIONERS.

CONFESSION OF JUDGMENT. See JUDGMENT.

CONSTITUTIONAL LAW.

Attorney's fee. Class legislation. Statute authorizing taxing of an attorney's fee against the company in event a judgment is recovered against it for killing stock through failure to fence, is unconstitutional and void. Wilder *v.* Chicago, etc., R. Co. (Mich.). 162.

Carriers. Charter contract. Charter of Georgia R. & B. Co. *held* not a contract between state and railroad that latter might charge whatever it choosed within certain prescribed limits, and company is subject to provisions of subsequent legislation providing for commissioners to regulate railroad tariffs. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

CONSTITUTIONAL LAW—*Continued.*

Carriers. Rates. State may prescribe rates to be charged by railroad in absence of charter provision prohibiting it, subject to limitation that carriage is not required without reward, and that what is done does not amount to regulation of foreign or interstate commerce. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Charter restriction against regulation of rates. 518 *n.*

Citizenship. Corporations have no absolute right to recognition in any state save that where it was created. Term "citizen" in constitution does not include corporation. Woodward *v.* Commonwealth (Ky.). 498.

Corporations. Personality. 507 *n.*

Crossing. Public benefit. Statute requiring company to make crossing outside of any enclosure on demand of any two citizens, *held* unconstitutional. Gulf, etc., R. Co. *v.* Ellis (Tex.). 292.

Express companies. License. Kentucky act requiring foreign express companies to procure license is not in violation of federal constitution. Woodward *v.* Commonwealth (Ky.). 498.

Farm crossing. Statute requiring railroads to make farm crossing is unconstitutional in so far as it applies to companies which secured their right of way before its enactment. Gulf, etc., R. Co. *v.* Rowland (Tex.). 286.

Legislative control. When exempt. In order to exempt corporations from legislative control, exemption must appear clearly and unmistakably. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Private corporations. Obligation of contract. Railroad company is private corporation, and a contract embodied in its charter is within constitutional clause prohibiting impairment of obligation of contract. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Public use. Legislative control. When property is affected with a public use business is subject to public control for convenience and security of public, and to prevent unreasonable charges, and favoritism by unjust discrimination. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Railroad depots. Regulation by statute. 465 *n.*

Rates; power of legislature to regulate. 518 *n.*

Residence and citizenship of corporation. 507 *n.*

Title of act. Constitutionality. Statute providing that all gates at farm crossings shall, in the absence of an agreement, be constructed, etc., by landowner, may be inserted in statute entitled "An act requiring railroad corporations to fence their right of way," etc. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

CONSTRUCTION.

Filing map. Right of company. When company has as required by General Railroad Act, filed map and survey of land and given required notice, it has acquired right to construct its road upon such line in nature of lien upon the land, which is exclusive as to all other companies and free from interference. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

CONTRACTORS. See MAIL.

CONTRACTS. See RECEIVER.

CONTRIBUTION.

Doctrine of contribution stated. Application where one company meets entire expense of constructing crossing where its track crosses that of another company. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

CONTRIBUTORY NEGLIGENCE. See ANIMALS; CHILDREN; FIRES.

Liability notwithstanding. Although party injured is negligent, company is still liable if by exercise of ordinary care after discovery of danger accident

CONTRIBUTORY NEGLIGENCE—*Continued.*

could have been prevented, or, if company failed to discover danger when the exercise of ordinary care would have discovered it. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Liability notwithstanding. Party injured at crossing is entitled to recover notwithstanding want of ordinary care on his part if those in charge of train could by exercise of ordinary care have avoided injuring him. Louisville, etc., R. Co. *v.* Schuster (Ky.). 407.

Nonsuit. Contributory negligence being matter of defence which, must be proved to satisfaction of jury; it cannot constitute ground for nonsuit. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Province of court. According to rule in Texas, it is not error for court to omit to instruct that it was plaintiffs' duty as they approached crossing to look and listen for trains if charge as to contributory negligence has been given in general terms. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

CORONER'S INQUEST. See EVIDENCE.

CORPORATIONS. See CITIZENSHIP; PLEADING AND PRACTICE.

Constitutional law. Citizenship. Corporation has no absolute right to recognition in any State, save that where it was created. Term "citizen" in constitution does not include corporations. Woodward *v.* Commonwealth (Ky.). 498.

Corporate existence. On appeal from justice's court in action for killing stock it is not necessary for plaintiff to prove that railway company is a corporation to entitle him to recover. Kansas City, etc., R. Co. *v.* Bolson (Kan.). 144.

Personality of corporations. 507 *n.*

Private corporation. Obligation of contract. Railroad company is a private corporation though its uses are public, and contract embodied in charter is within constitutional clause prohibiting impairment of contract. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Residence and citizenship. 507 *n.*

Residence and citizenship of corporations. In federal courts. 507 *n.*

Sale of road. By railroad-incorporation law of Texas there is no authority conferred upon railroads to sell their tracks nor to purchase track of another company. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

Transfer of property. Railroad cannot so dispose of its track and property as to incapacitate itself from fulfilling its duties to the public except express power has been conferred upon it. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

CRIMINAL LAW.

Obstruction of highway. Receiver. Corporation in hands of receiver cannot be prosecuted criminally for obstruction of highway by receiver's servants or agents. State *v.* Wabash R. Co. (Ind.). 1.

CROSSING.

CONSTRUCTION OF CROSSING AND RESTORATION OF STREET.

Alteration of track. Power of court to require lateral change in location of tracks long before laid on public streets should not be exercised unless reasonably necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Approaches to crossing: duty of company as to. 261 *n.*

Bridges and footways: duty to construct. 261 *n.*

Bridge over highway. *Mandamus.* Manner in which duty of restoring streets should be performed after building bridge over tracks and approaches thereto. Mandate of court may properly be specific in that regard. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

CROSSING—*Continued.*

Bridge over highway. Necessity of works by another company *held* not a fatal objection to *mandamus* proceedings against defendant. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridge over street. *Mandamus.* Where *mandamus* proceedings were pending against two railroad companies to compel them to bridge their tracks, and the roads were near together so that bridges should be made continuous over all the tracks, *held* not error to require both causes to be tried together. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridge over street. Necessity. In view of necessity that bridges be built over tracks of two railroads if over either, evidence, *held* admissible as to extent of use of crossing by the other company showing necessity for bridge. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridges over streets. Statute. Special act authorizing company to construct branch lines and requiring city to build approaches to street bridges construed as not applicable. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Bridging street. Cost. Apportionment. In proceedings against two companies to compel construction of bridge over tracks, each company was properly required to construct those parts above their own tracks and approaches upon their sides without other apportionment. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Change of highway. 262 *n.*

Constitutionality of statute. Public benefit. Statute requiring company to make crossing outside of any enclosure on demand of any two citizens *held* unconstitutional. Gulf, etc., R. Co. *v.* Ellis (Tex.). 292.

Construction of crossing. Negligence. 263 *n.*

Duty of company to make crossing. 260 *n.*

Grade crossing. Bridge. Fact that road has once been constructed at grade does not exempt it from bridging when that becomes necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Grade crossing. Construction. Statute relating to highway crossings construed as intended to provide how grade crossing should be constructed, but not as authorizing all crossings to be at grade. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Grade crossing. Revocation of Contract. 262 *n.*

Lessee: duty of. 262 *n.*

Receiver: liability of, for negligence in constructing crossing. 262 *n.*

Restoration of street. Charter of company construed as imposing continuous duty as to restoring public streets by bridging or otherwise when necessary. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Restoration of street. *Mandamus* proceedings may be prosecuted to determine mode in which street should be restored and to compel performance although city council has not yet changed established grade. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Sufficiency of crossing. Statutory requirements. 262 *n.*

FARM CROSSING.

Acquiring easement by prescription. 320 *n.*

Agreement for cattle pass. Under agreement of land owner with agent negotiating sale of lands, *held* that only obligation on part of company was to maintain cattle pass so long as trestle bridge was in existence, and not to prevent them discontinuing use of such bridge. Canada Southern R. Co. *v.* Erwin (Can.). 311.

Agreement for farm crossings. 314 *n.*

Agreement with agent for purchase of lands, verbally, for construction of two under-crossings. Evidence *held* to show that plaintiff relied upon law to secure him crossing, and not upon any contract, and that he could not therefore compel company to provide under-crossing. Canada Southern R. Co. *v.* Clouse (Can.). 296.

CROSSING—*Continued.*

Constitutionality of statute. Compensation. Statute requiring railroads to make farm crossing is unconstitutional in so far as it applies to companies which secured their right of way before its enactment. Gulf, etc., R. Co. *v.* Rowland (Tex.). 286.

Constitutionality of statute. Public benefit. Statute requiring company to make crossing outside of any enclosure on demand of any two citizens *held* unconstitutional. Gulf, etc., R. Co. *v.* Ellis (Tex.). 292.

Duty to provide. Company *held* bound to provide such farm crossings as might be necessary, nature and number of such crossings to be determined on reference to master. Canada Southern R. Co. *v.* Clouse (Can.). 296.

Easement. Acquisition by prescription. Proprietor of lands may by open and uninterrupted use for more than 20 years acquire right by prescription although statute prohibits travelling upon crossing of railroad without consent of company. Turner *v.* Fitchburg R. Co. (Mass.). 317.

Easement. Prescription. Plaintiff using sub-way under trestle for more than 20 years *held* entitled to assume that there was a reservation in the deed from the original grantor of the right of way which was lost, or he was entitled to claim easement under the Prescription Act. Wells *v.* Northern R. Co. (Ont.). 314.

Fence. Land-owner taking advantage of statute authorizing him to construct crossing, but imposes upon him duty of maintaining gates, railroad is not, in absence of negligence, liable for injuring cattle there, even though cattle belonged to third party. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

Fence. Liability of company. 184 *n.*

Fences. Where statute authorizes land-owner to construct crossing, but imposes upon him duty of maintaining gates, the companies are not liable for injuring cattle at such crossing, even though cattle belonged to third person. Pennsylvania Company *v.* Spaulding (Ind.). 184.

Gate. Company erecting gate and constructing private crossing is under no obligation either by statute or implied contract to keep gate in repair or closed. Evansville, etc., R. Co. *v.* Mosier (Ind.). 196.

Gates; when allowed at. 118 *n.*

Sub-way. Easement. Prescription. Where sub-way was left under trestle bridge which land-owner had used since 1862, *held*, that though plaintiff could not prevent filling of sub-way he was entitled to damages for his property in the easement. Wells *v.* Northern R. Co. (Ont.). 314.

CROSSING OF TWO ROADS.

Collision at railroad crossing. Duty of engineer. 285 *n.*

Collision. Breach of contract. Action by one company against another to recover damages for collision at crossing may be maintained under contract by which defendant company was to maintain crossing, and collision on was caused by servants of defendant failing to obey signal. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Collision. Breach of contract. Where agreement regulating use of crossing has been made employees on train having right of way are not bound to anticipate any breach of agreement. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Collision. Condition of engineer. In actton for injuries to car by collision at railroad crossing it may be shown that defendant's engineer had been drinking. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Collision. Damages. Evidence. In action for injuries to car, testimony as to cost of taking up and repairing car and as to difference in value of car before and after injury is competent. New York, etc., R. Co. *v.* Grand Rapids & I. R. Co. (Ind.). 283.

Construction of road. Nature of Crossing. 267 *n.*

Crossing of two roads. Repairs. Expenses. Lessee company while operating road receives benefit resulting from safe crossing and services of

CROSSING—*Continued.*

watchman, and takes them subject to burden of expense as provided by statute. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Grade crossing. Injunction. Fact that one company had, pending proceedings to enjoin grade crossing, constructed works at cost of $6,000, which would become useless if under-crossing were decreed, *held* not sufficient reason for refusal of injunction. Humeston *v.* Chicago, etc., R. Co. (Iowa). 263.

Grade crossing. Injunction granted restraining one company from constructing grade crossing over track of another where track of plaintiff was constructed upon heavy grade, and there was statute authorizing company to carry road across or under any other railway. Humeston *v.* Chicago, etc., R. Co. (Iowa.) 263.

Grade crossings. Necessity. Injunction. 267 *n.*

Joint obligation. Apportionment of expense. Under Ohio statute burden of maintaining crossing of two roads is common to both companies, and where either pays whole expense, it is entitled to recover from the other equal proportion thereof. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Lessee. Owner of track. Company having possession of road as lessee is one "owning track" within meaning of statute, which provides that crossing shall be maintained at joint expense of companies owning tracks. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Location of road. Injunction. Where company has filed map it may obtain injunction against another road attempting by construction of road upon or crossing its intended route to interfere. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

Rights of crossing a railroad are secondary to those of that crossed. 267 *n.*

Right to construct railroad crossing. Injunction. 266 *n.*

PERSONAL INJURIES.

Accident at crossing. Duty of traveller. 377 *n.*

Agreement for running powers. Gateman. Duty of railroad company operating road under agreement to pay another company specified sum for use of tracks where gates and gatemen are maintained. Responsibility for negligence of gateman whose services it has accepted. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Backing train. Duty of company. Where train has just passed and is backing again company should have person on rear car so that he may give warning. Duane *v.* Chicago, etc., R. Co. (Wis.). 416.

Boy coasting. Instruction that unless employees failed to make use of appliances to prevent accident after they became aware of danger, or of fact that deceased was riding down hill on a sled, finding should be for defendant, *held* properly refused being applicable only where injured party was a trespasser upon the track. Erwin *v.* St. Louis, etc., R. Co. (Mo.). 390.

Contributory negligence. 363 *n.*

Contributory negligence. Absence of care. Where party drove on track with the view obstructed, and wind blowing which deadened sound of train, and train was running at unusual rate of speed and gave no signal, *held* that facts required submission of case to jury. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Contributory negligence. Accident at crossing. Horses taking fright. 383 *n.*

Contributory negligence. Crossing in front of moving train. 424 *n.*

Contributory negligence. Crossing in view of train. Where deceased saw train and thought he could pass before it reached crossing and whipped up his horses, being under the influence of liquor, and acted recklessly, *held* that there could be no recovery. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Contributory negligence. Duty to stop, look, and listen. 325 *n.*

CROSSING—*Continued.*

Contributory negligence. Duty to look. Where there are circumstances which might prevent person injured from looking, instruction that jury must find for defendant if deceased could have seen approach of train, or was notified of approach before he started, *held* properly refused. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Contributory negligence. Failure to look. Fact that person driving at trot as he approached crossing did not look past certain cars for purpose of ascertaining if there was any train approaching, *held* not sufficient to charge him with want of due care. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Contributory negligence. Infant. Where boy of eleven years was killed at crossing, instruction that jury should consider boy's age and discretion *held* erroneous and misleading. Erwin *v.* St. Louis, etc., R. Co. (Mo.). 390.

Contributory negligence. Instructions. If court instruct that deceased was required to use such care as man of ordinary prudence would have used, defendant is not entitled to instruction that it was his duty to make use of his senses of sight, hearing, etc. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Contributory negligence. Instruction. Illustration. Court, in submitting question whether deceased was guilty of gross negligence, illustrated remarks by stating case of one going upon track to commit suicide, *held* that the charge was not misleading. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Contributory negligence: liability notwithstanding. Although party injured is negligent, company is still liable if, by exercise of ordinary care after discovery of danger, accident could have been prevented, or if company failed to discover danger when exercise of ordinary care would have discovered it. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Contributory negligence: liability notwithstanding. Party injured at crossing is entitled to recover, notwithstanding want of ordinary care on his part, if those in charge of train could, by exercise of ordinary care, have avoided injuring him. Louisville, etc., R. Co. *v.* Schuster (Ky.). 407.

Contributory negligence: liability notwithstanding. Where person attempted to cross in full view of engine, but fell and was run over, instruction directing verdict for defendant is erroneous, as company might be liable if engineer could have prevented the accident. State *v.* Baltimore & O. R. Co. (Md.). 412.

Contributory negligence. Looking and listening. It is duty of one about to cross crossing to look and listen for approaching train. Duty when track is obstructed. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Contributory negligence. Looking and listening. It is not error for court to omit to instruct that it was duty of plaintiffs as they approached track to look and listen, if the charge as to contributory negligence has been given in general terms, negligence not being a question of law. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Contributory negligence. Looking and listening. Travellers upon highway which runs parallel to track before crossing it are under no obligations to look for train before they discover crossing. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Contributory negligence. Looking and listening. Where train had passed within view of person intending to cross so that he had no reason to expect approach of train in direction from which such train went, rule requiring travellers to look and listen has no application if such person was injured by backing of such train without warning. Duame *v.* Chicago, etc., R. Co. (Wis.). 416.

Contributory negligence. Nonsuit. Where party familiar with dangerous crossing stopped, looked down the track and listened, but did not look up the track because he could not see along it, and finding from the time that no train was due, drove upon the track and was injured by irregular train

CROSSING—*Continued.*

approaching at high rate of speed without warning, *held* error to direct compulsory nonsuit. McWilliams *v.* Philadelphia, etc., R. Co. (Pa.). 401.

Contributory negligence. Obstructed view. If view of track is partially obstructed, greater care is required of traveller than would be if he had open view. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Contributory negligence. Open gate. Persons approaching crossings may presume that gatemen are discharging their duties. Open gate is notice of safe crossing, and in absence of other circumstances it is not negligence to drive at trot onto tracks through open gate, though view is obstructed. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Contributory negligence. Parties were killed while crossing track with view partly obstructed, the jury having the right to infer that they looked and listened, and there was negligence on the part of the company in running train at greater rate of speed than statutory rate, and leaving gate open; *held* that company was liable. State *v.* Boston & M. R. Co. (Me.). 356.

Contributory negligence. Passing between cars. If person knows that cars are stopping temporarily, and he attempts to pass between them on the draw-bars, he is, as a matter of law, guilty of contributory negligence even though directed to so pass by a brakeman. Lake Shore, etc., R. Co. *v.* Pinchin (Ind.). 383.

Contributory negligence. Province of jury. 369 *n.*, 402 *n.*

Contributory negligence. Province of jury. Where deceased could not have seen or heard train until his horses were within four feet of track, and when car was almost behind him horses stepped upon rail and he was thrown under car and killed, and no signal was given by engine which was pushing car, *held* that verdict of jury upon contributory negligence of plaintiff was properly taken. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Contributory negligence. Question of fact. Question as to whether person injured at crossing was guilty of contributory negligence is usually one of fact. Omaha, etc., R. Co. *v.* O'Donnell (Neb.). 346.

Contributory negligence. Sufficiency of crossing. Cripple who left safe path along sidewalk to go upon road leading across railroad over plank crossing on dark night, and who got beyond planking and stumbled among the rails and was injured, *held* guilty of contributory negligence. Delaware, etc., R. Co. *v.* Cadow (Pa.). 406.

Duty of company. 327 *n.*

Exceptionally dangerous crossing. Duty of company using tracks across generally travelled street in populous city for its convenience in switching, whereby crossing is rendered exceptionally dangerous. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Finding of jury. Stfficiency of evidence. 404 *n.*

Flagman and gates: duty to maintain, at crossings at generally travelled street in populous town where track is used for switching. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

Flagman. Employment. Common crossing. Where tracks of three companies are laid along a street which intersects three other streets, at each of which each company stationed and paid a flagman who flagged all trains, *held* that company employing flagman was responsible for his negligence, although such negligence happened when flagging train of another company. Buchanan *v.* Chicago, etc., R. Co. (Iowa). 378.

Flagman: necessity of. Pleading. Instruction. 345 *n.*

Flagman: necessity of. Statutory requirements. 345 *n.*

Gate. Leaving gate open is invitation to persons to cross. State *v.* Boston & M. R. Co. (Me.). 356.

Gateman: duty of. Gateman should observe tracks and know when it becomes dangerous for persons to cross, and knowing so to close gates and keep them closed, and when tracks are clear to open gates and keep them open. Cleveland, etc., R. Co. *v.* Schneider (Ohio). 334.

CROSSING—*Continued.*

Horses taking fright at cars. 333 *n.*

Horses taking fright. Evidence. Where plaintiff was injured through horses taking fright at box car standing partially on highway, testimony that other horses had taken fright at same car is inadmissible. Cleveland, etc., R. Co. *v.* Wynant (Ind.). 328.

Horses taking fright. Liability. If car at which horses took fright was moved onto highway by persons for whom defendant was not responsible, company is not liable for injuries, unless it negligently permitted car to remain an unreasonable time. Cleveland, etc., R. Co. *v.* Wynant (Ind.). 328.

Imputed negligence. In Maine the negligence of the driver is not imputed to a passenger carried gratuitously, who has no control over the driver. State *v.* Boston & M. R. Co. (Me.) 356.

Imputed negligence. Parent and child. 362 *n.*

Inevitable accident. Instruction that if neither party was guilty of negligence, and injury was result of accident, no recovery can be had, cannot be to defendant's prejudice. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Instruction. Hypothetical case. Where there is evidence that train struck oxen drawing wagon, instruction upon hypothetical case of collision between engine and wagon cannot be deemed misleading. Gulf, etc., R. Co. *v.* Greenlee (Tex.). 424.

Invitation to cross. Evidence *held* sufficient to present for determination of jury, question whether inducement had been held out to public to use crossing. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Invitation to cross track. Company by the formation of a crossing may extend invitation to persons to use such crossing for purpose of access to premises of others, though not necessarily to any public way beyond. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Invitation to public. License. 325 *n.*

Invitation to public. License. If person attempting to cross track merely by license of company and not from circumstances in which invitation to treat same as a highway can be inferred, no recovery can be had for negligence causing death. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Listening for train. Fact that person was shown not to have listened for train *held* not sufficient to preclude recovery, there being evidence that witnesses in neighborhood heard no sound of approaching train until alarm signal was sounded, although engineer may have testified that he rang bell. Hanks *v.* Boston & A. R. Co. (Mass.). 321.

Negligence. Province of court. After trial judge has defined negligence and contributory negligence, it is not error to refuse to instruct with reference to actions of deceased in attempting to cross in front or in regard to her duty to look and listen, these being matters for the jury. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Obstructed view. Where certain bushes growing outside of right of way were bare of leaves and no obstruction to view, court should not instruct that it was negligence for company to suffer bushes to grow on right of way so as to obstruct view. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Ordinance. Evidence. Ordinance limiting speed and requiring signals is properly admitted in evidence where track-repairer is injured within limits of city. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Permission to cross. If by implied assent of company public are permitted to cross track those in charge of train should be on lookout and give notice of their approach. Louisville, etc., R. Co. *v.* Shuster (Ky.). 407.

Pleading. Petition. If petition alleges negligence on part of defendant causing death of plaintiff's son, that without negligence on part of deceased he was struck by passing train, these allegations are sufficient. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Pleading. Statute of limitations. If ordinary declaration alleges injuries to have been caused by moving of locomotive whilst amended declaration

CROSSING—*Continued.*

filed after lapse of statutory period alleges improper signalling as further cause, plea of statute of limitations to whole declaration does not raise question of statutory bar as applied to allegations of negligence of flagman. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Public road. Establishment. Fact that statute authorizes laying out and establishment of roads by county authorities, does not negative existence of roads otherwise established, and relieve company from duty of running trains across public road by dedication, so as to avoid injury. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Signal and sign. Statutory provision. Although there may be no express provision of law requiring sign or signal, it may be question for jury whether such precautions ought not to be taken. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Signals. Character of warning required to be given. 350 *n.*

Signals. Demurrer to evidence. Where evidence upon question whether bell was rung or man standing on car to give danger signal while train was being backed is conflicting, an instruction in nature of demurrer to evidence is properly overruled. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Signals. Duty to give warning signals at crossing. 349 *n.*

Signal: failure to give. Except in case of sudden emergency, fact that engineer was otherwise engaged and did not give statutory signal is no justification to company. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Signal. Failure to give statutory signal when train was running at high rate of speed and not upon regular time, is to be considered in deciding question of negligence and contributory negligence. Omaha, etc., R. Co. *v.* O'Donnell (Neb.). 346.

Signals. Frightening horses. Province of jury. 383 *n.*

Signal. Negligence. It is negligence *per se* to fail to sound whistle 80 roads from crossing, but it does not excuse traveller from exercising due care. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Signals. Nonsuit. Where party was killed while crossing track with head wrapped up when wind was blowing, and whistle was blown but not continuously until train reached crossing, as required by statute, *held* that motion for nonsuit was properly refused, as deceased might have heard signal which ought to have been given. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Signal. Statutory signals. 351 *n.*

Signal; where required. 350 *n.*

Signal. Whether signals are necessary is a question of fact. 351 *n.*

Speed. Absence of flagman. Where statute prohibits running of train at greater speed than certain rate, unless flagman and gate is maintained, fact that gate has been left open and unattended gives right to expect that train will not pass at greater speed than ordinary rate, besides being evidence that train is not expected. State *v.* Boston & M. R. Co. (Me.). 356.

Speed: prohibited rate. City ordinance. 362 *n.*

Speed. Statutory regulation. Where speed at particular place is limited to six miles an hour, refusal to instruct that speed was not proximate cause of accident, when if it had not been for an excessive speed train would not have been near crossing when deceased attempted to cross over, *held* proper. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Travelling over partially obstructed crossing. 333 *n.*

Trespasser. Passing between cars. Person finding crossing obstructed by standing train, who proceeded along track to place where opening had been made in train and attempted to cross there, *held* a trespasser. Dahlstrom *v.* St. Louis, etc., R. Co. (Mo.). 387.

Unavoidable accident. 383 *n.*

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Degree of care. Railroad company is bound to use ordinary care and diligence as to stock rightfully on highway. 449 *n.*

Evidence *held* to show that cow was killed within right of way, and not on crossing, as was claimed by company. Union Pac. R. Co. *v.* Blum (Neb.). 119.

Injuries to animals at crossings. 121 *n.*

Killing stock. Duty of company. Where killing of stock at public crossing is claimed to have been caused by a defective crossing, instruction that it is the duty of the company to construct sufficient and safe crossings *held* not error. Atchison, etc., R. Co. *v.* Miller (Kan.). 190.

Signal: duty to give, in absence of statute. 449 *n.*

Signal. Duty to signal for animals. 448 *n.*

Signal: failure to give. Where cattle lawfully on highway are killed at crossing, evidence of omission to give signal before reaching crossing as required by statute is competent. Palmer *v.* St. Paul, etc., R. Co. (Minn.). 447.

Starting train. Frightening horses on right of way. While horses were being driven along right of way to farm crossing at which they had escaped, train apparently drew up for a time and proceeded again after sounding the whistle; horses were frightened, and ran on bridge and were injured; *held*, that the company was not liable. Hurd *v.* Grand Trunk R. Co. (Ont.). 459.

OTHER MATTERS.

Acquiring easement by prescription. 320 *n.*

Dedication of highway. Where land-owner allowed public use of a road and required company to make crossing, which had been kept up and used for six years, *held*, that there was evidence from which jury might infer dedication. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Easement. Acquisition by prescription. Proprietor of lands may by open and uninterrupted use for more than 20 years acquire right by prescription, although statute prohibits travelling upon crossing of railroad without consent of company. Turner *v.* Fitchburg R. Co. (Mass.). 317.

Highway by dedication. 321 *n.*

CUSTOM. See CARRIERS.

Carrier. Delivery of goods. Fact that railroad had previously delivered freight shipped to order of consignor to third party before acceptance of draft, such draft, however, having always been paid, will not justify finding that there was course of dealing which would take the case out of the rule as to proper delivery. Pennsylvania R. Co. *v.* Stern (Pa.). 551.

Carrier. Delivery of goods without presenting bill of lading. 554 *n.*

Delivery of goods. Usage. Railroad delivering cattle, consigned to shipper, to party whom it is directed merely to notify, *held* liable to bank discounting consignor's draft to such person. Fact that it was customary to so deliver shipments between same parties *held* no defence. Northern Pennsylvania R. Co. *v.* Commercial Bank (U. S.). 556.

DAMAGES. See ANIMALS; FIRE.

Death. Measure of damages. Instruction as to measure of damages to which mother is entitled for the death of her son *held* proper. Enumeration of subjects of consideration. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Exemplary damages. Refusal to carry. Railroad is liable for vindictive damages for refusal to carry goods only in case of ill-will or malicious disregard for rights of another. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

Exemplary damages: to entitle plaintiff to, they must be claimed; and negligence causing injury must have been wilful. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Opinion as to damages. 203 *n.*

DEATH.

Action by widow. Suit by deceased. Fact that deceased had instituted suit to recover damages which was pending at the time of his death is no bar to action by his widow and children. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Children. Interest in deceased's life. Under South Carolina statute, children of person killed may maintain action, although at date of the killing all of plaintiffs were adults having no legal claim on deceased for support. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Damages. Funeral expenses. In action for death funeral expenses properly constitute element in estimating damages. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Damages: measure of. Instruction as to measure of damages to which mother was entitled for death of her son, enumeration of subjects of consideration *held* not to extend the limits of investigation beyond what plaintiff would have received had her son lived. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Evidence. Coroner's inquest. In action for negligent killing, testimony of witnesses taken before coroner's inquest cannot be admitted even though offered at second trial after it has been admitted at first trial. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Pleading. Petition. If petition alleges negligence on part of defendant causing death of plaintiff's son; that without negligence on part of deceased he was struck by passing train, these allegations are sufficient. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

DESPATCH COMPANY. See CARRIERS.

DISCRIMINATION.

Action for charges. Unreasonableness. It is no defence in action by railway to recover charges that they were unreasonable so as to give undue preference to other persons. Lancashire, etc., R. Co. *v.* Greenwood (Eng.). 537.

Action for penalty. Limitation. 536 *n.*

Action for pleading. Allegation that railroad directed agents to refuse to receive or transport any goods offered for transportation by the plaintiff except when prepaid, does not state cause of action if it fails to aver that agents have refused to receive or transport goods, and that he has actually been injured. Allen *v.* Cape Fear, etc., R. Co. (N. Car.). 532.

English Railway and Canal Traffic Act: action for discrimination under. 542 *n.*

Excessive charges. Jurisdiction of railroad commissioners. Oregon board of railroad commissioners *held* to have no jurisdiction to require railroad company to refund to shipper sum of money alleged to have been exacted in excess of reasonable charge. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Pleading. 536 *n.*

Rates. Right to ship. In absence of statutory or charter regulations to the contrary, railroad may discriminate as to rates, provided no unreasonable charge is made; but no discrimination can be made in the right to ship. Avinger *v.* South Carolina R. Co. (S. Car.). 519.

DISSOLUTION.

Action by people: general creditors have no right to notice of, and no right to intervene in action brought in behalf of people for dissolution of insolvent corporation until after final judgment. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Action by people. If attorney-general commences action in name of people against an insolvent corporation, and after appointment of temporary re-

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ceiver mortgagee commences suit to foreclose, people are not necessary parties. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Confession of judgment. New York statute declaring void judgments confessed by corporation after filing petition for dissolution, does not affect consent to entry of order of sale in foreclosure proceedings, although made after action brought for dissolution. Herring *v.* New York, etc., R. Co. (N. Y.) 54.

Judgment. New corporation composed of purchasers of property and franchises of Pennsylvania corporation, and incorporated by Delaware legislature, and vested with privileges and franchises of such corporation granted by the state of Delaware, *held* not to acquire right to judgment entered in favor of old corporation. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Operation of statute. Statute providing that if company failed to finish its road within time prescribed by charter, the corporation shall be dissolved, is not self-operating, and the corporate existence does not terminate without judicial proceedings. Day *v.* Ogdensburg, etc., R. Co. (N. Y.). 102.

Powers conferred on courts in actions for dissolution of corporation is not affected by chapter of Code of Civil Procedure which substitutes actions in place of writs of *scire facias* and *quo warranto*. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Sale of property. Dormancy. Sale of property and franchises of corporation in Pennsylvania and act of Delaware legislature incorporating purchasers and vesting them with franchises granted to such corporation by state of Delaware, *held* not to pass right to judgment entered in favor of old corporation before the sale. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Sale of road. Purchase of stock and destruction of bonds of one railroad by stockholders of another, and sale of such purchased road to the road in which they were stockholders, *held* not to operate as a dissolution of the road whose stock and bonds they had purchased so as to relieve it from its debts and obligations. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

Title. Relation back. Equitable rule giving receiver title to property by relation back, does not confer upon him title which will override a disposition of the property made by the court before his appointment. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

EASEMENT. See CROSSINGS.

EQUITY. See RECEIVER.

EVIDENCE. See ANIMALS; FENCES.

Carriers. Letters from agents of connecting lines. Railroad cannot introduce letters written to its agents by agents of connecting road regarding mistake in transporting freight received from such road causing delay. Waite *v.* New York, etc., R. Co. (N. Y.). 576.

Coroner's inquest. In action for negligent killing, testimony of witnesses taken before coroner's inquest cannot be admitted even though offered at second trial after it has been admitted at first trial. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

Declarations. Carriers of live stock. In action against company for loss of jack, declarations of tramp found in the car with the dead jack *held* inadmissible. St. Louis, etc., R. Co. *v.* Weakly (Ark.). 635.

Failure to call witness who was with plaintiff at time he fell into hole in depot grounds *held* not to raise a presumption that such person would testify against plaintiff's theory of the accident. Cross *v.* Lake Shore, etc., R. Co (Mich.). 476.

Opinion as to damages. 203 *n.*

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Opinion as to value. 203 *n.*

Opinion. Competency of witness. In action for injury to stock, witnesses who have had experience in the business for which animals are used can competently testify as to their value. Texas, etc., R. Co. *v.* Virginia, etc., Co. (Tex.). 201.

Opinion evidence. 202 *n.*

Opinion. Non-expert. Witnesses not shown to be experts may testify to facts which appear to be opinions or conclusions of facts if subject-matter cannot be described as it appeared to witness, and opinions are founded on facts such as men in general are capable of comprehending. Atchison, etc., R. Co. *v.* Miller (Kan.). 190.

Ordinance limiting speed, and requiring signals, is properly admitted in evidence where track-repairer is injured within limits of city. Kelly *v.* Union R. & T. Co. (Mo.) 396.

Other accidents. Where plaintiff sues to recover for injuries sustained through horses taking fright at car standing upon highway, testimony that other horses have been frightened at same car is inadmissible. Cleveland, etc. R., Co. *v.* Wynant (Ind.). 328.

Parol evidence. Bill of lading. Where bill of lading has been executed in duplicate-parol proof of contents is incompetent until after satisfactory excuse for non-production of both parts of instrument. Alabama, etc., R. Co. *v.* Mount Vernon Co. (Ala.). 657.

Secondary evidence. Documents in another state. In action for killing stock, if the plaintiff's claim be in possession of person in another state, and not under control of party wishing to introduce it, secondary evidence may be admitted to prove its contents. Memphis, etc., R. Co. *v.* Hembree (Ala.). 128.

EXPRESS COMPANIES.

Carriers: express companies are. 496 *n.*

Foreign corporation. License. Kentucky act requiring foreign express companies to procure license is not in violation of federal constitution. Woodward *v.* Commonwealth (Ky.). 498.

License. Construction of statute. Kentucky act requiring all agents of foreign express companies to secure license not affected by subsequent act requiring foreign express companies to pay fee upon renewing license. Woodward *v.* Commonwealth (Ky.). 498.

License. Repeal of law. Kentucky act requiring agents of foreign express companies to take out license is not repealed by subsequent act requiring all companies to pay tax of six per cent upon net profits. Woodward *v.* Commonwealth (Ky.). 498.

Limiting liability. 496 *n.*

Loss of goods. Notice of claim. Condition in receipt that, in order to recover for loss, written claim must be presented within thirty days after receipt of package is reasonable, but not always imperative; where claim was presented as soon after discovery of loss as was reasonably possible, condition will not preclude recovery. Glenn *v.* Southern Ex. Co. (Tenn.). 627.

FARM CROSSINGS. See CROSSINGS.

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Cattle guards. 189 *n.*

Cattle guards in streets of towns and villages. 189 *n.*

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Cattle guards. Under Indiana statute authorizing land-owner to construct private crossing, railroad company is not bound to construct and maintain cattle guards at such crossing. Pennsylvania Company *v.* Spalding (Ind.). 184.

Defective fences. Clear preponderance of evidence, *held*, to show that railway fence was in defective condition and that cow was killed within right of way, and not on crossingas was claimed by company. Union Pac. R. Co. *v.* Blum (Neb.). 119.

Depot grounds. Construction of statute. Horse driven across depot grounds, *held*, "not running at large" within the meaning of the statute giving right of recovery against company for stock killed while running at large at point where right to fence exists. Johnson *v.* Chicago, etc., R. Co. (Iowa). 131.

Depot grounds: duty of company to fence at. 133 *n.*

Duty of railroad company to fence. 132 *n.*

Duty of railway company to fence. 165 *n.*

Duty to construct. Depot grounds. 172 *n.*

Duty to construct. Depot grounds. Criterion by which question whether place where stock entered upon track was or was not within depot grounds. Rinear *v.* Grand Rapids & I. R. Co. (Mich.). 166.

Duty to construct. Depot gronnds. Grounds upon main track upon which are watertank, telegraph office, ticket office, and place for eating and sleeping, occupied by stationmen, and upon which there is platform where trains stop, are depot grounds within meaning of Wisconsin statute. Peters *v.* Stewart (Wis.). 174.

Duty to construct. Depot grounds. Question whether place where stock entered upon track was or was not within depot grounds, if undisputed, becomes a question of law for the court whether defendant is liable. Rinear *v.* Grand Rapids & I. R. Co. (Mich). 166.

Duty to construct. Station. Siding. Railroads are not required to fence tracks at stations or sidings or across streets, and not liable for killing animals at such places without negligence. Beckdolt *v.* Grand Rapids & I. R. Co. (Ind.). 168.

Duty to construct. Streets and highways. Crossings. 173 *n.*

Entry on track through opening: verdict implying, is not supported by evidence that animals were upon track at point nearer opening than certain street-crossing but could not be tracked to either crossing or opening. Rhines *v.* Chicago, etc., R. Co. (Iowa). 123.

Failure to fence. In action to recover double damages, in which jury were instructed that plaintiff can recover only when he proves that animals entered on track through an opening, verdict implies a finding that animals so entered. Rhines *v.* Chicago, etc., R. Co. (Iowa). 123.

Failure to construct. Damages. For neglect of company to fence track, landowner may recover dimunition of rental value of farm. Damages are not necessarily limited to what it would cost to build a fence. Emmons *v.* Minneapolis, etc., R Co. (Minn.). 126.

Gate: construction of. Under Iowa statute, gate may be constructed so as to open either outward or inward, nor does it matter that fastening is on side next to the pasture. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gate: duty of land-owner to give notice of defective. 117 *n.*

Gate. Farm crossing: where gates are allowed at. 118 *n.*

Gate. Fastening. Evidence that fastening claimed to have been insufficient was like those in general use is not admissible. Payne *v.* Kansas City, etc., R. Co. (Iowa). 115.

Gate hung on outside. Though there is no obligation upon company to hang gate upon any particular side of fence, admission of testimony that there was nothing to prevent hanging of gate on inside, *held*, not to prejudice defendant. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gates in railway fences. 117 *n.*

FENCES—*Continued.*

Gate. Insufficiency of similar fastenings. Admissibility of evidence tending to show that other fastening similar to fastening on gate in question had proved insufficient in practice. Payne *v.* Kansas City, etc., R. Co. (Iowa) 113.

Gate. Insufficient fastening. Gate is part of fence, and, if insufficent to turn cattle, there is a failure to fence within meaning of statute. Rule not altered by fact that insufficiency is caused by reason of fastening being out of repair. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gate left open by land-owner. 117 *n.*

Gate. Opening. Evidence tending to show that there were calves on the other side of the right of way, belonging to the cows in question, *held*, admissible for purpose of showing that gate was opened by pressure of cows against it. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Gate. Sufficiency of fastening. When gate opens outward on track, fastening is not sufficient if gate opens by mere pressure against it. Payne *v.* Kansas City, etc., R. Co. (Iowa). 113.

Insufficiency. Evidence. Testimony that barbed wire was so close to ground that horses had stepped over it, leaving bunches of hair on the barbs, and that their tracks were plainly seen, *held*, to sustain charge of negligence on part of company in not protecting track by sufficient fence. Missouri Pac. R. Co. *v.* Metzger (Neb.). 148.

Obligation to fence. Under statute providing that company need not fence at depots, etc., question whether it is bound to fence at point where opening has been made for accommodation of shipper is properly left to jury. Rhines *v.* Chicago, etc., R. Co. (Iowa). 123.

Open gate. Province of jury. If evidence tends to show that stock passed through a gate which had been open for about 36 hours, whether failure to inspect the gate for three or four days is negligence and whether gate being open for 36 hours will raise presumption of negligence are matters for determination of the jury. Wait *v.* Burlington, etc., R. Co. (Iowa). 194.

Opening fence. Cattle escaped onto track at same point at which owner had unwound wires to drive them into the field from the right of way along which he had been driving them. *Held*, that the company was not liable, on negligence on its part in maintaining the fence having been shown. Davidson *v.* Central Iowa R. Co. (Iowa). 158.

Private crossing. Gate. Company erecting gate and constructing private crossing is under no obligation either by statute or implied contract to keep gate in repair or closed. Evansville, etc., R. Co. *v.* Mosier (Ind.). 190.

Private crossing. If land-owner takes advantage of statute which authorizes him to construct crossing and imposes upon him duty of maintaining gates, railroad, in absence of negligence, is not liable for killing cattle at such crossing, even though cattle belonged to third person. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

Private crossing. Liability of company. 184 *n.*

Private crossing. Under Indiana statute, railroad is not liable for stock injured at private crossing though the crossing may have been constructed before passage of statute authorizing land-owner to c nstruct crossing and imposing upon him duty of maintaining gates. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

Private crossing. Where statute authorizes land-owner to construct crossing, but imposes upon him duty of maintaining gates, the companies are not liable for injuring cattle at such crossing, even though cattle belonged to third person. Pennsylvania Company *v.* Spaulding (Ind.). 184.

Sufficiency of fence. Drifted snow. 118 *n.*

Title of act. Constitutionality. Statute providing that all gates at farm crossings, shall, in the absence of an agreement, be constructed, etc., by land-owner, may be inserted in statute entitled "An act requiring railroad corporations to fence their right of way," etc. Hunt *v.* Lake Shore, etc., R. Co. (Ind.). 178.

FERRYMEN. See CARRIERS.

FIRE.

Communication from premises of company. Where house was destroyed by fire communicated from freight shed of company, which was ignited by sparks from locomotive, *held*, that questions put to jury were proper and that there was sufficient evidence of negligence to sustain finding for the plaintiff. Canada Southern R. Co. *v.* Phelps (Can.). 207.

Continuance. Absent witnesses. Affidavit that absent witnesses would prove value of property to be much less than that claimed by plaintiff, *held*, not sufficient to warrant granting of continuance. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Contributory negligence. 245 *n.*

Damages. Growing grass. Value of grass at place at which it was grown is proper measure of damages, and plaintiff is entitled to interest. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Damages: measure of. Destruction of grass-roots. 245 *n.*

Damages: measure of. Destruction of orchard. 246 *n.*

Defective engine. Pleading and proof. Allegations of negligence in plaintiff's complaint, *held*, not to be construed as including allegation that company s engine was defective. St. Louis, etc., R. Co. *v.* Fudge (Kan.). 246.

Defective engines. 244 *n.*

Evidence. Former fires in wood-yard. 237 *n.*

Evidence. Other fires. Evidence tending to show that other fires were set about same time by same engine which set fire for which action is brought is competent. Haseltine *v.* Concord R. Co. (Mass.). 236.

Evidence: sufficiency of. 244 *n.*

Insurable interest. Although company has by statute insurable interest in all property along line of road, right of owner to recover is not affected by reason of fact that company have been unable to obtain insurance. Haseltine *v.* Concord R. Co. (Mass.). 236.

Jurisdiction. Under Texas statute, action for causing fire may be brought in county through which road runs and at county seat at which it has an agent, although property destroyed was in another county. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Other fires. 243 *n.*

Personal property. Statutory provision. Under statute rendering company liable for property destroyed by fire, owner of personal property may recover although personalty was only temporarily left near track. Haseltine *v.* Concord R. Co. (Mass.). 236.

Pleading. 249 *n.*

Presumption of negligence. 243 *n.*

Presumption of negligence. Escape of sparks. 242 *n.*

Presumption. Escape of sparks: where it is proved that fire was caused by, testimony is sufficiently *prima facie* to establish negligence. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Proof of fires caused and sparks emitted at other times. 237 *n.*

Sparks: usual quantity of. 243 *n.*

Special findings. Verdict. Where no defect in engine was alleged, and where fire according to finding of jury may have escaped wholly by reason thereof, *held*, error for court to render judgment upon such finding. St. Louis, etc., R. Co. *v.* Fudge (Kan.). 246.

Spreading fire. Liability of company where fire spreads. 235 *n.*

Spreading. If company are negligent in running locomotive, they are responsible for damages caused to property by fire communicated thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine. Canada Southern R. Co. *v.* Phelps (Can.). 207.

FIRE—*Continued.*

Statute of 14 George III. c. 75, sect. 86, is in force in Province of Ontario, but has no application to protect a party from legal liability as a consequence of negligence. Canada Southern R. Co. *v.* Phelps (Can.). 207.

Title to property. 237 *n.*

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FOREIGN CORPORATIONS.

Express companies. Kentucky act requiring agents of foreign express companies to take out license is not repealed by subsequent act requiring all companies to pay tax of six per cent upon net profits. Woodward *v.* Commonwealth (Ky.). 498.

Express companies. License. Kentucky act requiring all agents of foreign express companies to secure license, not affected by subsequent act requiring foreign express companies to pay fee upon renewing license. Woodward *v.* Commonwealth (Ky.). 498.

License. Kentucky act requiring foreign express companies to procure license is not in violation of Federal Constitution. Woodward *v.* Commonwealth (Ky.). 498.

Service of process. Nebraska statute as to service on corporations, *held*, to apply to foreign corporations, except where there are special provisions to contrary. Chicago, etc., R. Co. *v.* Manning (Neb.). 618.

Service of process on foreign corporation. 622 *n.*

FRANCHISE.

Taxes. Bondholders. Priority. Amount due for state tax upon franchise of corporation, in hands of receiver, takes priority of claim upon funds in his hands over claims of bondholders. Central Trust Co. *v.* New York City & N. R. Co. (N. Y.). 9.

Tax on franchise of corporation. Distinction between franchise and property tax. 15 *n.*

Taxes. Receiver. If receiver operates road in same manner as if corporation were solvent, moneys derived from use of franchise are subject to payment of tax upon franchise imposed by New York statute. Central Trust Co. *v.* New York City & N. R. Co. (N. Y.). 9.

Transfer of property. Railroad cannot so dispose of its track and property as to incapacitate itself from fulfilling its duties to the public, except express power has been conferred upon it. Gulf, etc., R. Co. *v.* Morris (Tex.). 94.

FRIGHTENING HORSES. See CROSSING.

GATES. See CROSSING.

HUSBAND AND WIFE.

Action by widow. Suit by deceased. Fact that deceased had instituted suit to recover damages, which was pending at the time of his death, is no bar to action by his widow and children. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

Death. Action by widow. Remarriage Fact that, pending suit to recover damages for killing her husband, plaintiff married again does not preclude her right to maintain the action. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

IMPUTED NEGLIGENCE. See NEGLIGENCE.

INCORPORATION.

Pleading. Petition. Under Texas statute, an allegation in a petition that the plaintiff is a body duly incorporated by and under the laws of the State of Texas is sufficient. Texas, etc., R. Co. *v.* Virginia, etc., Co. (Tex.). 201.

INFANTS. See CHILDREN.

INJUNCTION.

Crossing at grade. Injunction granted to restrain one railroad from constructing grade crossing over tracks of another. Humeston *v.* Chicago, etc., R. Co. (Iowa.). 263.

Grade crossing. Fact that one company had, pending proceedings to enjoin grade crossing, constructed works at cost of $6000, which would become useless if under-crossing were decreed, *held*, not sufficient reason for refusal of injunction. Humeston *v.* Chicago, etc., R. Co. (Iowa). 263.

Grade crossing. Necessity. 267 *n.*

Judgment. Allegation of defence. Where it is sought to enjoin judgment on ground that plaintiff has defence to action and it would be inequitable to enforce judgment, facts constituting alleged defence must be pleaded, and it is not sufficient to merely allege that plaintiff had such a defence. Chicago, etc., R. Co. *v.* Manning (Neb.). 618.

Location of road. Right of company. Where company has, as required by railroad act, filed map and survey, it may obtain injunction against any other company attempting to interfere or obstruct construction of its track. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

INSOLVENCY. See DISSOLUTION; RECEIVER.

Court of chancery. Power to turn into money property of insolvent railroad for distribution among creditors, having been expressly given by statute, power to manage and preserve such property will be implied. Vanderbilt *v.* Little (N. J.). 18.

Operation of road. Insolvent road may be operated under control of court if necessary to maintain its traffic and connections, or otherwise to keep it in good condition. Vanderbilt *v.* Little (N. J.). 18.

INTERSTATE COMMERCE.

Interstate commerce act: Federal courts can have no jurisdiction over civil actions for violation of, without regard to diverse citizenship of parties. Action must be brought only in district of which defendant is an inhabitant. Connor *v.* Vicksburg & M. R. Co. (C. C.). 696.

What constitutes interstate commerce. 696 *n.*

What constitutes. Transportation from one state to another, or over connecting lines between two points within same state where one of such connecting lines runs entirely in another state, is interstate commerce, of which railroad commission can have no jurisdiction. Sternberger *v.* Cape Fear, etc., R. Co. (S. Car.). 693.

JUDGMENT.

Confession of judgment. Validity. New York statute declaring void judgments confessed by corporation after filing of petition for dissolution does not affect consent to entry of order of sale in foreclosure proceedings although made after action brought for dissolution. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

JUDGMENT—*Continued.*

Dissolution. Sale of property of corporation in Pennsylvania and incorporation of purchasers by Delaware legislature, *held*, not to operate as a dissolution of the original corporation, and that judgments in its favor were not extinguished, nor did they pass to the new corporation. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Finality of judgment. Foreclosure. Judgment determining that certain stocks and bonds are liable to be sold, imports absolute verity, and neither company nor creditors can impeach it in collateral proceedings. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Injunction. Allegation of defence. Where it is sought to enjoin judgment on ground that plaintiff has defence to action, and it would be inequitable to enforce judgment, facts constituting alleged defence must be pleaded, and it is not sufficient to merely allege that plaintiff had such defence. Chicago, etc., R. Co. *v.* Manning (Neb.). 618.

JURISDICTION. See UNITED STATES COURTS.

Fire. Under Texas statute, action for causing fire may be brought in county through which road runs and at county seat at which it has an agent although property destroyed was in another county. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

KILLING STOCK. See ANIMALS.

LEASE.

Crossings: duty of lessee as to. 262 *n.*

Crossing of two roads. Expenses. Lessee company while operating road receives benefit resulting from safe crossing and services of watchman, and takes them subject to burden of expense as provided by statute. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Negligence of lessee. Company cannot lease its road without statutory authority so as to absolve itself from obligations to public and liability for damages occurring through negligent use of property. International, etc., R. Co. *v.* Moody (Tex.). 607.

"Owner of track:" lessee company is, under statute requiring crossing to be maintained at joint expense of companies owning tracks. Baltimore & O. R. Co. *v.* Walker (Ohio). 271.

Power to lease. Terms of mortgage and bonds held to preclude directors from exercising power of leasing road upon terms which render lessee responsible for mortgages; and fact that lease would reduce amount available for payment of coupons does not constitute breach of contract with bondholders. Day *v.* Ogdensburg, etc., R. Co. (N. Y.). 102.

Receiver. Expenses of receivership: charging, on leased line. 112 *n.*

Receiver. Liability for rent of leased line. 112 *n.*

Receiver. Priority of rentals due under lease over mortgages. 112 *n.*

Statutory authority. Under New York statute, corporation is empowered to lease road of corporation organized and constructed in Vermont, provided latter is authorized to lease its road. Day *v.* Ogdensburg, etc., R. Co. (N. Y.). 102.

LIBEL.

Carriers. Published order to servants. Instructions to servants of railroad not to ship for certain person except when freight charges are prepaid, and a request to connecting line to make similar order, is a privileged communication, and does not constitute libel in absence of express malice. Allen *v.* Cape Fear, etc., R. Co. (N. Car.). 532.

LICENSE. See CROSSING.

Express companies. Construction of statute. Kentucky act requiring all agents of foreign express companies to secure license, is not affected by subsequent act requiring foreign express companies to pay fee upon renewing license. Woodward *v.* Commonwealth (Ky.). 498.

Express companies. Foreign corporation. Kentucky act requiring foreign express companies to procure license is not in violation of Federal Constitution. Woodward *v.* Commonwealth (Ky.). 498.

Express companies. Repeal of law. Kentucky act requiring agents of foreign express companies to take out license is not repealed by subsequent act requiring all companies to pay tax of six per cent upon net profits. Woodward *v.* Commonwealth (Ky.). 498.

LIMITATIONS, STATUTE OF.

Action for penalty for discrimination by carrier. 536 *n.*

Killing stock. In absence of evidence showing manner in which company in possession of road acquired title, *held* that it must be presumed that it was operating the road under the charter of the company by which it was constructed, which contained no special limitation of actions against it. Kentucky Cent. R. Co. *v.* Kinney (Ky.). 199.

Pleading. Separate counts. If ordinary declaration alleges injuries to have been caused by moving of locomotive whilst amended declaration filed after lapse of statutory period alleges improper signalling as further cause, plea of Statute of Limitations to whole declaration does not raise question of statutory bar as applied to allegations of negligence of flagman. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Receiver may set up, in action for injuries sustained in running trains by receiver, statute requiring such suits to be brought within two years. Bartlett *v.* Kelm (N. J.). 15.

Substitution of receiver. Court may, when consenting to substitution of receiver as defendant in action for personal injuries restrain him from setting up defence of Statute of Limitations, action having been commenced against company within statutory limit. Lehigh Coal & N. Co. *v.* Central R. Co. of N. J. (N. J.). 2.

LIVE STOCK. See CARRIERS.

LOCATION.

Interference with construction. Injunction. Where company has, as required by Railroad Act, filed map and survey, it may obtain injunction against any other company attempting to interfere or obstruct construction of its track. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

Right of company. Where corporation has, in pursuance of general railroad act, filed map and survey of land and given required notice, it has acquired right to construct its road upon such line in nature of lien upon the land which is exclusive as to all other companies, and free from interference. Rochester, etc., R. Co. *v.* New York, etc., R. Co. (N. Y.). 267.

MAIL.

Carriage of U. S. mail. 511 *n.*

Contract for carrying. Deduction. United States statute giving postmaster-general authority to make deduction from pay of contractors where trip is not made, *held* not repealed. Chicago, etc., R. Co. *v.* United States (U. S.). 508.

MANDAMUS.

Bridge over highway. Necessity of works by another company, *held* not a fatal objection to *mandamus* proceedings against defendant. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

MANDAMUS—*Continued.*

Highway crossing. Restoration of street. *Mandamus* proceedings may be prosecuted to determine mode in which street should be restored, and to compel performance, although city council has not yet changed established grade. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

Joint trial of actions. Where *mandamus* proceedings were pending against two companies to compel them to bridge their tracks and the roads were near together so that bridges should be made continuous over all the tracks, *held* not error to require both causes to be tried together. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

MAP. See LOCATION.

MASTER AND SERVANT. See AGENTS; RECEIVERS.

Receiver: wages during recovery from injury received while road was in hands of. 6 *n.*

MORTGAGE.

Foreclosure. Answer by receiver. It is the duty of a receiver to file an answer to a bill to foreclose a mortgage, although plaintiff in such bill may be the owner of all the claims, and has entered into possession of the road. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Foreclosure. Conclusiveness of judgment. Judgment of court determining that certain stocks and bonds form part of the mortgage property and that they were properly sold and never came into possession of receiver previously appointed in action by the people for dissolution, *held* binding upon the general creditors, although no final receiver had been appointed in the people's action and no final judgment rendered therein, and that fact that same person had been appointed receiver in both proceedings did not affect validity of judgment. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Confession of judgment. New York statute declaring void judgments confessed by corporation after filing of petition for dissolution, does not affect consent to entry of order of sale in foreclosure proceedings although made after action brought for dissolution. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Judgment determining that certain stocks and bonds are liable to be sold imports absolute verity, and neither company nor creditors can impeach it in collateral proceedings. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Parties. Temporary receiver appointed at instance of attorney-general *held* not a necessary party to a suit to foreclose mortgage. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Parties. Unsecured creditors are not necessary or proper parties, and have no right to intervene, but are bound by an adjudication against the mortgagee. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Receiver. Defence. Receiver cannot set up as a defence against a bill to foreclose against a mortgagee in possession an agreement with complainant by which receiver was to hold road for benefit of complainant, and the latter was to pay the receiver's costs and expenses, which he has not done. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Foreclosure. Receiver. If action has been commenced by attorney-general praying for dissolution on account of insolvency, and temporary receiver is appointed, it is within the discretion of the court to authorize commencement of foreclosure proceedings, to appoint receiver therein to supersede first receiver and to order all property delivered to him. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Foreclosure. Receiver. Validity of bonds. Right of receiver to set up defence which goes to validity of bonds upon which suit is brought, although he has parted with possession of corporate property to mortgagee. Ryan *v.* Anglesea R. Co. (N. J.). 51.

MORTGAGE—*Continued.*

Foreclosure. Sale of property. Dormancy. Act of Delaware legislature incorporating purchasers of property and franchises of corporation in Pennsylvania and vesting them with privileges and franchises granted by state of Delaware, *held* not to operate as a dissolution of the original corporation, and judgments in its favor were not extinguished, nor did they pass to the new corporation. Wilmington & R. R. Co. *v.* Downward (Del.). 87.

Foreclosure. Sufficiency of answer. What is sufficient answer by receiver to a bill to foreclose a mortgage when the receiver has entered into an agreement with the complainant by which the latter has obtained possession of the mortgage property. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Priority. Taxes. Amount due for state tax from corporation in hands of receiver takes priority of claim upon funds in receiver's hands over claims of bondholders. Central Trust Co. *v.* New York City & N. R. Co. (N. Y.). 9.

Receiver. Surplus. Rights of creditors. If mortgage trustees fail to make claim in proceedings for appointment of receiver to funds in hands of receiver, surplus arising from receiver's management is payable to unsecured creditor at whose suit receiver was appointed. Sage *v.* Memphis, etc., R. Co. (U. S.). 40.

MUNICIPALITY.

Resolution of council. Upon report of council by committee recommending certain action, record of proceedings in the word "adopted" expresses the will of the body. State *v.* Minneapolis, etc., R. Co. (Minn.). 250.

NAME. See PLEADING AND PRACTICE.

NEGLIGENCE. See ANIMALS; FENCES; FIRE.

Appliances used. If railroad conform to rules in general use by prudently conducted companies they are free from blame unless they violate positive requirements of the law. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Exemplary damages: to entitle plaintiff to, negligence causing injury must have been wilful, wanton, or reckless. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Imputed negligence. In Maine the negligence of the driver is not imputed to a passenger carried gratuitously who has no control over the driver. State *v.* Boston & M. R. Co. (Me.). 356.

Imputed negligence. Parent and child. 362 *n.*

ORDINANCE. See SPEED.

PARENT AND CHILD. See CHILDREN.

Imputed negligence. 362 *n.*

Infant plaintiffs. Next friend. The husband of their mother has no interest in suit by infant plaintiffs to recover for killing their father, and he may act in such suit as next friend. International, etc., R. Co. *v.* Kuehn (Tex.). 421.

PASSENGERS. See CARRIERS; STATIONS.

Approaches to depot. 486 *n.*

Defective depot grounds. Stepping into hole. 482 *n.*

Depot grounds: care required as to, by railroad companies. 482 *n.*

Depot grounds. Contributory negligence. Plaintiff after leaving ticket office was cautioned to "look out for the steps," but by crossing platform obliquely he missed them and sustained injuries. *Held*, that question of contributory negligence was for jury. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

PASSENGERS—*Continued.*

Depot grounds. Light. Simple neglect to sufficiently light depot grounds was not such negligence on part of company as to entitle plaintiff injured to exemplary damages. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Depot grounds. Route to street. Injury. 481 *n.*

Depot grounds. Slippery steps. Passenger injured by falling on slippery steps leading to station, although he knew there were other steps which he might have used, and that the ones he did use were dangerous, *held* entitled to recover. Osborne *v.* London, etc., R. Co. (Eng.). 483.

Hole in depot grounds. Held not error to admit evidence of civil engineer that hole was in dangerous place and needed protection. Cross *v.* Lake Shore, etc., R. Co. (Mich.). 476.

Hole in depot grounds near recognized way so near that person traveling at night fell into the hole. Company held liable for injury where plaintiff exercised proper care. Cross *v.* Lake Shore, etc., R. Co. (Mich.). 476.

Station. Blowing off steam. Frightening horses. Parties leaving station in carriage were injured through horses being frightened by sound of locomotive blowing off steam. Company *held* not liable, there being no evidence of obligation on their part to screen railroad from road. Simkins *v.* London, etc., R. Co. (Eng.). 487.

Station grounds. Duty to light. Railroad company must see that station grounds are properly lighted a proper time before arrival and after departure of trains. Alabama G. S. R, Co. *v.* Arnold (Ala.). 466.

Way to and from depot. It is the duty of the company to keep a recognized way which is used in going to and from trains in a reasonably safe condition. Cross *v.* Lake Shore, etc., R. Co. (Mich.). 476.

PENALTY.

Action for penalty, for discrimination by carrier. Limitation. 536 *n.*

Attorney's fee. Statute authorizing the taxing of an attorney's fee against a railroad in the event of a judgment being recovered against it for killing stock through its failure to fence, is in the nature of a penalty and is unconstitutional and void. Wilder *v.* Chicago, etc., R. Co. (Mich.). 162.

PLEADING AND PRACTICE.

Allegation of incorporation. Under Texas statute an allegation in a petition that the plaintiff is a body duly incorporated by and under the laws of the state of Texas is sufficient. Texas, etc., R. Co. *v.* Virginia, etc., R. Co. (Tex.). 201.

Arguments of counsel. Discussion should be confined to issues and evidence and court should see that this is done. Statements in regard to adverse attorney, if calculated to prejudice jury, is sufficient to set verdict aside. Missouri Pac. R. Co. *v.* Metzger (Neb.). 148.

Continuance. Absence of witnesses. Affidavit that absent witnesses would prove value of property to be much less than that claimed by plaintiff. *Held* not sufficient to warrant granting of continuance. Galveston, etc., R. Co. *v.* Horne (Tex.). 238.

Directing verdict. Federal courts. It is proper for U. S. circuit court to direct verdict for plaintiff where no matter affecting his claim is left in doubt, and all evidence clearly shows he is entitled to recover. Northern Pennsylvanian R. Co. *v.* Commercial Bank (U. S.). 556.

Injuries causing death. If petition alleges negligence on part of defendant causing death of plaintiff's son that without negligence on part of deceased he was struck by passing train, these allegations are sufficient. Missouri Pac. R. Co. *v.* Lee (Tex.). 364.

Instruction. Prejudicial error. Where evidence is admitted upon which instructions are given, both evidence and instructions being competent if founded upon proper pleading, *held* that such evidence and instructions were erroneous, but that where they do not seem to have affected the ver-

PLEADING AND PRACTICE—*Continued.*

dict the error is not sufficient to require a reversal. Atchison, etc., R. Co. *v.* Miller (Kan.). 190.

Misnomer. Party in interest. Action commenced against one company was after expiration of statutory period for bringing suit changed by amendment to action against another company which had leased the road from the company first sued and was operating it at the time of the accident, *held*, that the action might be maintained against the lessee company. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Service of summons. Foreign corporation. Nebraska statute as to service on corporations *held* to apply to foreign corporations except where there are special provisions to contrary. Chicago, etc., R. Co. *v.* Manning (Neb.). 618.

Special findings. If in action for personal injuries jury find fact which will preclude plaintiff's recovery, judgment must be entered for defendant notwithstanding general verdict for plaintiff. Lake Shore, etc., R. Co. *v.* Pinchin (Ind.). 383.

Statute of Limitations. Separate counts. If ordinary declaration alleges injuries to have been caused by moving of locomotive, whilst amended declaration filed after lapse of statutory period alleges improper signalling as further cause, plea of Statute of Limitations to whole declaration does not raise question of statutory bar as applied to allegations of negligence of flagman. Pennsylvania Co. *v.* Sloan (Ill.). 440.

Substitution of receiver by consent of court does not constitute a new cause of action, but is merely a proceeding in the action already brought. Lehigh Coal & N. Co. *v.* Central R. Co. of N. J. (N. J.). 2.

Variance. Although a petition alleges that stock was injured in March, fact that evidence shows that animal was injured in August is immaterial. Texas, etc., R. Co. *v.* Virginia, etc., Co. (Tex.). 201.

PRACTICE. See PLEADING AND PRACTICE.

PRESCRIPTION. See CROSSINGS.

PRIVILEGED COMMUNICATIONS. See LIBEL.

PURCHASE OF ROAD. See SALE OF ROAD.

RAILROAD COMMISSIONERS.

Authority and jurisdiction of state railroad commissioners. 550 *n.*

Jurisdiction. Adjusting differences. Act creating railroad commissioners did not give board authority to adjust differences between railroad companies and shippers, although it was empowered to hear complaints. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Powers. Extension. Powers conferred by legislature on commissioners will not be extended by implication and actions which board attempts to take will not be upheld unless authority is affirmatively shown. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Powers. Remission of charges. Provision in statute requiring commissioners to enter complaint in court of equity where its orders have been violated or neglected, *held* not to authorize such proceedings in order to enforce repayment of freight charges claimed to have been unreasonable. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

Prohibition. Jurisdiction of railway commissioners. 537 *n.*

Regulating charges. Jurisdiction. Board of railroad commissioners of Oregon *held* to have no jurisdiction to require railroad company to refund to shipper sum of money alleged to have been exacted in excess of reasonable charge. Board of Railroad Commrs. *v.* Oregon R. & N. Co. (Ore.). 542.

RATES. See CARRIERS.

REBATES. See CARRIERS.

RECEIVER. See MORTGAGE.

Action for injuries against corporation in hands of receiver. 1 *n.*

Agency. In running the road a receiver represents or is the agent of the company. Bartlett *v.* Keim (N. J.). 15.

Appointment. When court will appoint receiver on application of judgment creditor who has not sued out execution and obtained return of *nulla bona.* Sage *v.* Memphis, etc., R. Co. (U. S.). 40.

Carriage of goods. Loss. Goods lost in transit while road is operated by receiver not being carried under an undertaking by the corporation, the negligence causing the loss is not the negligence of the corporation, and an action will not lie against it. Kansas Pac. R. Co. *v.* Searle (Colo.). 6.

Chancery court: powers of, and of receiver appointed by it over insolvent railroads are those, expressly conferred by legislation, and those necessary to the exercise of the powers expressly conferred. Vanderbilt *v.* Little (N. J.). 18.

Claim by creditor. Purchaser of promissory note executed by a railroad who obtains judgment thereon is not precluded from seeking satisfaction of same out of funds in hands of receiver because he has not yet paid for the note being under legal obligation by the indorsement to pay the amount agreed. Sage *v.* Memphis, etc., R. Co. (U. S.). 40.

Common carrier: liability of receiver as. 8 *n.*

Common carrier. Receiver of a railroad company who controls the corporation is no less a common carrier because property of road is in custody of court. Biers *v.* Wabash, etc., R. Co. (C. C.). 646.

Connecting lines. Interchange of cars. Receiver is obliged to receive and transport cars and furnish accommodations to connecting lines to same extent and in same manner as proper officers of railroad companies. Biers *v.* Wabash, etc., R. Co. (C. C.). 646.

Contracts. Consent to sue. He who contracts with receiver does so with knowledge that for any injury received he can only get redress by obtaining permission of court to sue, and satisfying court that claim is well founded. Vanderbilt *v.* Little (N. J.). 18.

Contract. If on examination by court, contract of receiver appears to be detrimental to the trust, it should not be enforced, nor should damages for its non-performance be awarded. Vanderbilt *v.* Little (N. J.). 18.

Contract. Improvidence. If contractor has made contract in ignorance of its improvidence, and by its non-performance has suffered actual loss, the fund ought to reimburse him. Vanderbilt *v.* Little (N. J.). 18.

Contracts made by receiver bind him as the representative of the trust, and are to be enforced, or redress for their breach is to be accorded out of the fund. Vanderbilt *v.* Little (N. J.). 18.

Contract. Operation of road. Chancellor may personally deliver or make contracts for operation of road, or he may confer authority to make such contracts upon receiver. Vanderbilt *v.* Little (N. J.). 18.

Contract. Oral. Statute of frauds. When contracts for purchase of goods have been orally made by receiver, delivery to agents and receipt and acceptance and payment therefore, will satisfy the provision of the statute of frauds, and the contract will bind the company. Vanderbilt *v.* Little (N. J.). 18.

Court of chancery: insolvent railroad may be operated under control of, if necessary, to maintain its traffic and connections, or otherwise to keep it in good condition. Vanderbilt *v.* Little (N. J.). 18.

Criminal prosecution. Corporation in hands of receiver cannot be prosecuted for crimes and misdemeanors committed by receiver's servants, e.g., the obstruction of a highway. State *v.* Wabash R. Co. (Ind). 1.

Crossing: liability of receiver for negligence in constructing. 262 *n.*

RECEIVER—*Continued.*

Expenses of receivership; charging on leased line. 112 *n.*

Final receiver. Rights of creditors. Final receiver appointed under statute for winding-up company, is not bound to consult general creditors but is subject only to order of court. Herring *v.* New York, etc., R. Co. (N. Y.) 54.

Foreclosure. Duty to answer. It is the duty of a receiver to file an answer to a bill to foreclose a mortgage, although plaintiff in such bill may be the owner of all the claims and has entered into possession of the road. Ryan *v.* Anglesea R. Co. (N. J.) 51.

Foreclosure. Sufficiency of answer. What is sufficient answer by receiver, to a bill to foreclose a mortgage when the receiver has entered into an agreement with the complainant, by which the latter has obtained possession of the mortgage property. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Foreclosure. Validity of bonds. Right of receiver to set up defence which goes to validity of bonds upon which suit is brought, although he has parted with possession of corporate property to mortgagee. Ryan *v.* Anglesea R. Co. (N. J.). 51.

Injuries occurring under receiver's management. New York doctrine. 5 *n.*

Injury to servant. Wages during recovery from injury received. 6 *n.*

Lease. Liability of receiver for rent of leased line. 112 *n.*

Liability of receiver for torts and injuries. 4 *n.*

Officer of court. Express power given by statute to operate an insolvent railroad, is not conferred on receiver as an independent person but as an officer of the court. Vanderbilt *v.* Little (N. J.). 18.

Operation of road. Contracts. Chancellor may personally deliver or make contracts for operation of road, or he may confer authority to make such contracts upon receiver. Vanderbilt *v.* Little (N. J.). 18.

Personal injuries: character of judgment against receiver for. Payable out of income. 5 *n.*

Personal injury. Limitation. Receiver may set up in action for injuries sustained in running trains by receiver; statute requiring such suits to be brought within two years. Bartlett *v.* Keim (N. J.). 15.

Priorities. Lease. Priority of rentals due under lease over mortgages. 112 *n.*

Substitution of receiver by consent of court does not constitute a new cause of action, but is merely a proceeding in the action already brought. Lehigh Coal & N. Co. *v.* Central R. Co of N. J. (N. J.). 2.

Substitution of receiver. Limitations. Court may, when consenting to substitution of receiver as defendant in action for personal injuries, restrain him from setting up defence of statute of limitations; action having been commenced against company within statutory limit. Lehigh Coal & N. Co. *v.* Central R. Co. of N. J. (N. J.). 2.

Surplus in hands of receiver. If trustees fail to make any claim to funds in hands of receiver, surplus arising from receiver's management is payable to unsecured creditor at whose suit receiver was appointed. Sage *v.* Memphis etc., R. Co. (U. S.). 40.

Taxes. Bondholders. Priority. Amount due for State tax takes priority of claim upon funds in receiver's hands, over claims of bondholders of the corporation. Central Trust Co. *v.* New York City & N. R. Co. (N. Y.). 9.

Taxes. Exclusive remedy. Remedy provided by New York corporation tax act for collection of taxes from corporations, does not preclude court from ordering receiver of insolvent corporation to pay the tax upon the franchise. Central Trust Co. *v.* New York City & N. R. Co. (N. Y.). 9.

Taxes: payment of, by receiver. 15 *n.*

Taxes upon franchises. If a receiver operates the road in the same manner as if the corporation were solvent, moneys derived from use of franchise are subject to the payment of the tax upon the franchise imposed by the New York corporation tax act. Central Trust Co. *v.* New York City & N. R. Co. (N. Y.). 9.

Temporary receiver appointed in action at instance of attorney-general is not vested with title of property, but is a mere manager, and is not a necessary

RECEIVER—*Continued.*

party to a suit to foreclose. Herring *v.* New York, etc., R. Co. (N. Y.). 54.

Torts committed before receiver was appointed. 5 *n.*

RIGHT OF WAY. See LOCATION.

SALE OF ROAD.

Branch road. Purchase. Statute authorizing company to locate, construct, and operate a branch line does not confer power to purchase line already constructed. Gulf, etc., R. Co. *v.* Morriss (Tex.). 94.

Dissolution. Liability for debts. Purchase of stock and destruction of bonds of one railroad by stockholders of another and sale of such purchased road to the road in which they were stockholders, *held*, not to operate as a dissolution of the road whose stock and bonds they had purchased so as to relieve it from its debts and obligations. Gulf, etc., R. Co. *v.* Morriss (Tex.). 94.

Power to sell railway property and franchises. 101 *n.*

Statutory authority. By railroad incorporation law of Texas, there is no authority conferred upon railroads to sell their tracks nor to purchase track of another company. Gulf, etc., R. Co. *v.* Morriss (Tex.). 94.

SIGN. See CROSSING.

SIGNAL.

Animals at crossings. Duty to give signal in absence of statute. 449 *n.*

Animals. Crossing. Where cattle are killed at crossing, evidence of omission to give signal before reaching crossing, as required by statute, is competent. Palmer *v.* St. Paul, etc., R. Co. (Minn.). 447.

Animals. Duty to signal for animals at crossings. 448 *n.*

Crossing. Character of signal required to be given. 350 *n.*

Crossing. Demurrer to evidence. Where evidence upon question whether bell was rung or man standing on car to give danger signal while train was being backed is conflicting, an instruction in nature of demurrer to evidence is properly overruled. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Crossing. Duty to give warning signal at crossing. 349 *n.*

Crossing. Frightening horses. 383 *n.*

Crossing. Negligence. It is negligence *per se* to fail to sound whistle 80 rods from crossing, but it does not excuse traveller from exercising due care. Atchison, etc., R. Co. *v.* Townsend (Kan.). 352.

Crossing. Statutory provision. Although there may be no express provision of law requiring signals on approaching crossings, it may be question for jury whether such precautions are necessary. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370

Crossing. Statutory signals. 351 *n.*

Crossing. Statutory signal: failure to give, when train was running at high rate of speed and not upon regular time, is to be considered in deciding question of negligence and contributory negligence. Omaha, etc., R. Co. *v.* O'Donnell (Neb.). 346.

Crossing. Where signal is required. 350 *n.*

Crossing. Whether signals are necessary is a question of fact. 351 *n.*

Ordinance. Evidence. Ordinance limiting speed and requiring signals is properly admitted in evidence where track-repairer is injured within limits of city. Kelly *v.* Union R. & T. Co. (Mo.). 396.

Statutory signal: failure to give. Except in case of sudden emergency, fact that engineer was otherwise engaged and did not give statutory signal is no justification to company. Petrie *v.* Columbia, etc., R. Co. (S. Car.). 430.

SLANDER AND LIBEL. See LIBEL.

SPECIAL FINDINGS. See PLEADING AND PRACTICE.

SPEED. See ANIMALS.

Crossing. Absence of flagman. Where statute prohibits running of train at greater speed than certain rate, unless flagman and gate is maintained, fact that gate has been left open and unattended gives right to expect that train will not pass at greater speed than ordinary rate, besides being evidence that train is not expected. State *v.* Boston & M. R. Co. (Me.). 356.

Crossing. Excessive speed. Where speed at particular place is limited to six miles an hour, refusal to instruct that speed was not proximate cause of accident, when, if it had not been for excessive speed, train would not have been near crossing when deceased attempted to cross, *held*, proper. Winstanley *v.* Chicago, etc., R. Co. (Wis.). 370.

Crossing. Prohibited rate. City ordinance. 362 *n.*

STATIONS. See FENCES.

Approaches to depot. 486 *n.*

Blowing off steam. Frightening horses. Parties leaving station, in carriage, were injured through horses being frightened by sound of locomotive blowing off steam. Company held not liable, there being no evidence of obligation on their part to screen railroad from road. Simkins *v.* London, etc., R. Co. (Eng.). 487.

Care required of railroad companies as to their depot grounds. 482 *n.*

Construction. Statutory regulation. When railroad can be compelled to construct and maintain depot under Illinois statute providing that railroads shall maintain depots where it is in the habit of receiving passengers and freight at all towns having a population of 500 or more. People *v.* Chicago, etc., R. Co. (Ill.). 462.

Dangerous place. Contributory negligence. Plaintiff, after leaving ticket office, was cautioned to "look out for the steps." By crossing platform obliquely he missed the steps and sustained injury. *Held*, that question of contributory negligence was for jury. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Defective depot grounds. Stepping into hole. 482 *n.*

Hole in depot grounds. *Held*, not error to admit evidence of civil engineer that hole was in dangerous place and needed protection. Cross *v.* Lake Shore, etc.. R. Co. (Mich.) 476.

Hole in depot grounds near recognized way so near that person travelling at night fell into the hole. Company held liable for injury where plaintiff excised proper care. Cross *v.* Lake Shore, etc., R. Co. (Mich.). 476.

Light: duty as to. Railroad company must see that station is safe and should cause it to be lighted at proper time before arrival and after departure of trains. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Light. Duty of railroad company to light station. 476 *n.*

Light. Exemplary damages; neglect to sufficiently light depot is not such negligence on part of company as to entitle party injured to. Alabama G. S. R. Co. *v.* Arnold (Ala.). 466.

Obligation to construct. In absence of charter or statutory provisions, railroad cannot be compelled to construct depot at points where it is in the habit of receiving and discharging passengers and freight. People *v.* Chicago, etc., R. Co. (Ill.). 462.

Passage to and from railroad trains. Duty of company. 482 *n.*

Railroad depot. Power to compel erection. 464 *n.*

"Regular station." Place where there has never been any agent but where trains sometimes stop, *held*, not "regular station" within meaning of North Carolina Code imposing penalty for receiving freight at any regular depot, station, wharf, etc. Kellogg *v.* Suffolk, etc., R. Co. (N. Car.). 529.

STATIONS—*Continued.*

Regulation by statute. Constitutional law. 465 *n*.

Route to street. Injury. 481 *n*.

Slippery steps. Injury to passenger. Passenger injured by falling on slippery steps leading to station, although he knew there were other steps which he might have used, and the ones he did use were dangerous, *held*, entitled to recover. Osborne *v.* London, etc., R. Co. (Eng.). 483.

Way to and from depot. It is the duty of the company to keep a recognized way, which is used in going to and from trains, in a reasonably safe condition. Cross *v.* Lake Shore, etc., R. Co. (Mich.). 476.

STATUTE.

Conflicting statutes. Construction. Where there are two acts or provisions of law relating to same subject, effect is to be given to both if that be prescribed. Chicago, etc., R. Co. *v.* United States (U. S.). 508.

Proviso in statutes: general purpose of, is to except clause covered by it from general presumption of statute, or from some provision of it, or to disqualify operation of statute in some particular. It is used as a conjunction to attach independent sentence or paragraph to body of act. Georgia R. & B. Co. *v.* Smith (U. S.). 511.

Repugnancy. Repeal. If two acts are repugnant, latter will operate as a repeal to the former to the extent of the repugnancy; but the second act will not operate as such repeal merely because it may repeat some of provisions of first one and omit others or add new provisions. Chicago, etc., R. Co. *v.* United States (U. S.). 508.

STATUTE OF FRAUDS.

Oral contract. Receiver. When contracts for purchase of goods have been orally made by receiver delivery, to agents and receipt and acceptance and payment therefor will satisfy the provision of the Statute of Frauds and the contract will bind the company. Vanderbilt *v.* Little (N. J.). 18.

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